# Supreme Court of the United States

OCTOBER TERM, 1962

# No. 1060

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ZEBEDEE HARDY, PETITIONER

*vs.*

UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX


| | Original | Print |
|---|---|---|
| Proceedings in the United States Court of Appeals for the District of Columbia Circuit | | |
| Petition for leave to prosecute appeal without prepayment of costs and affidavit in support thereof | 1 | 1 |
| Order appointing counsel | 3 | 3 |
| Motion for an order directing the furnishing of a stenographic transcript at the expense of the United States, and for an extension of time | 4 | 4 |
| Opposition to motion for an order directing the furnishing of a transcript at the expense of the United States | 8 | 7 |
| Petitioner's reply to respondent's opposition | 11 | 9 |
| Order re preparation of transcript, etc. | 15 | 11 |

| | Original | Print |
|---|---|---|
| Motion for clarification or rehearing | 16 | 12 |
| Order denying motion for clarification or rehearing | 20 | 15 |
| Motion to extend time | 21 | 16 |
| Order extending time | 23 | 17 |
| Motion for an order directing furnishing of stenographic transcript of balance of District Court proceedings or, in the alternative, for entry of an order denying leave to appeal | 24 | 18 |
| Response to petitioner's motion for an order directing furnishing of additional transcript | 29 | 21 |
| Order denying motion for stenographic transcript of the balance of the District Court proceedings | 30 | 22 |
| Order authorizing clerk to prepare a certified record | 31 | 23 |
| Designation of record (omitted in printing) | 32 | 23 |
| Clerk's certificate (omitted in printing) | 34 | 23 |
| Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari | 35 | 24 |

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File Endorsement Omitted]

No. 822-61

Misc. No. 1834

ZEBEDEE HARDY

*v.*

THE UNITED STATE OF AMERICA, RESPONDENT

PETITION FOR LEAVE TO PROSECUTE APPEAL WITHOUT PREPAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF—filed March 16, 1962

The petitioner, Zebedee Hardy being first duly sworn, on oath deposes and says that he desires to appeal from the order (or judgment) entered in the District Court on February 19, 1962 in Crim. No. 822-61, United State of America v. Zebedee Hardy, and is unable to pay the costs of the appeal, or to give security therefor; and that he believes that he is entitled to redress.

Your petitioner further states that subsequent to the entry of the order (or judgment) an application to prosecute an appeal from the order (or judgment) without prepayment of costs, accompanied by an affidavit in conformity with Section 1915 of Title 28, U.S. Code, was on February 19, 1962, made to the trial court, thereby enabling the trial judge to certify whether or not the appeal was taken in good faith, and that the trial court on February 19, 1962, denied petitioner's application.

The nature of the appeal is as follows:

1. Judge Holtzoff refuse to here testimony of certain defence witness.
2. Judge Holtzoff made accusation doing testimony of Officer Hutchinson, asserting they are justified in making mistake.

3. Police testified they received a tip, no one testified to confirm their statment.
4. The conflicting testimony of police officer should not have been excepted.
5. In adequate counsel.
6. He did not challenge the indictment sufficient.

[fol. 2] 7. The indictment was not a true bill.

8. Petitioner pray that this court will appoint him counsel.

WHEREFORE, petitioner requests that he be allowed to appeal from the order (or judgment) without being required to prepay fees or costs, or to give security therefor.

/s/ Zebedee Hardy
*Petitioner*

STATE of ..... )
) ss.
COUNTY of ..... )

I, /s/ Zebedee Hardy, being first duly sworn according to law, on oath depose and say that the matters and things stated in the foregoing petition and affidavit by me subscribed as facts are true, and that those matters and things stated therein as upon information and belief I believe to be true, and that I have this ..... day of ....., 1962, mailed a copy of the foregoing petition and affidavit, postage prepaid, to United State, attorney for District of Columbia, at his address United State District Court, Arthur J. Mclaughlin.

/s/ Zebedee Hardy
*Petitioner*

SUBSCRIBED AND SWORN TO before me by .....
..... this 15 day of March, 1962.

/s/ Edw. J. Keightley, Jr.
*Notary Public*

My Commission Expires November 23, 1965

[fol. 3]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1834

[File Endorsement Omitted]

[Title Omitted]

Before: Wilbur K. Miller, Chief Judge, in Chambers.

ORDER APPOINTING COUNSEL—Dated: March 19, 1962

Upon consideration of the petition for leave to prosecute an appeal without prepayment of costs, it is

ORDERED that Mozart G. Ratner, Esq., a member of the bar of this court be, and he is hereby, appointed to represent petitioner and allowed thirty days to file a memorandum in support of the petition.

[fol. 4]

# IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. Misc. 1834

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR AN ORDER DIRECTING THE FURNISHING OF A STENOGRAPHIC TRANSCRIPT AT THE EXPENSE OF THE UNITED STATES, AND FOR AN EXTENSION OF TIME—filed April 17, 1962

Petitioner, Zebedee Hardy, by his court-appointed attorney, respectfully moves this Court for an order directing the furnishing to him of a stenographic transcript of the District Court proceedings in this case, Crim. No. 822-61, held on January 11, 12, 15 and 16, 1962, at the expense of the United States, and for an order extending until 30 days after the receipt of said transcript the time within which a memorandum may be filed in support of his petition to prosecute an appeal without prepayment of costs; and in support thereof petitioner shows as follows:

On January 15, 1962, petitioner was convicted of narcotics violations under 26 U.S.C.A. Sec. 4704(a) and 21 U.S.C.A. Sec. 174. A petition for leave to appeal in forma pauperis was filed in the District Court, and was on [fol. 5] February 19, 1962, denied, the trial judge stating "that the appeal is frivolous and not taken in good faith." The petition herein was filed in this Court on March 15, 1962, and the undersigned was appointed by the court to represent petitioner on March 19, 1962.

Petitioner appears to present at least two issues for appeal: (1) that the evidence was insufficient to sustain a conviction, and (2) that evidence was improperly received, being the product of an illegal arrest. Each of

these claims manifestly states an "issue that is not plainly frivolous" *Ellis* v. *United States*, 356 U.S. 674, 675. Assuming that the mere statement of a non-frivolous claim is itself insufficient to require the granting of leave to appeal (*Whitt* v. *United States*, 104 U.S. App. D.C. 1, 259 F.2d 158) grant or denial would appear to turn on whether the record provides any basis for the assertion of such a claim.

In such cases it is the function of assigned counsel to act "in the role of an advocate" who must "diligently" and "conscientious[ly]" investigate the record in order to determine whether it provides any support for "the possible grounds of appeal". *Ellis, supra.* Here careful search of the transcript of the motion to suppress evidence made before trial, interview of the petitioner, and of both prosecuting and defense trial counsel have failed to reveal any information to support petitioner's claims or any other possible grounds for appeal.

[fol. 6] For this reason, and because the claims of error asserted here cannot be disposed of with finality without consideration of the trial proceedings as a whole, the undersigned is compelled to seek a transcript of the trial in order to determine whether there is any basis for the petition for leave to appeal. In these circumstances it would seem clearly less adequate and more wasteful of the "valuable" "working time" of the reporters and counsel (*Whitt, supra*, 104 U.S. App. D. C. at 4, 259 F.2d at 161) to resort to "the reporter's reading of * * * the transcript" (*Edwards* v. *United States*, 103 U.S. App. D. C. 171, 173, 257 F.2d 885, 887) in full than to order a stenographic copy prepared. Without a transcript, counsel is unable at this time conscientiously either to file a memorandum in support of the petition or to represent to this Court that appeal is frivolous.

It is therefore respectfully requested that the Court grant this motion for the furnishing of a transcript at the expense of the United States, and for an extension of time, as prayed for herein.

Respectfully submitted,

/s/ Mozart G. Ratner
(appointed by this Court)

/s/ Joseph L. Sax
1411 K Street, N.W.
Washington 5, D. C.
Counsel for Petitioner

April 17, 1962

[fol. 7]

CERTIFICATE OF SERVICE [omitted in printing]

[fol. 8]

## IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. Misc. 1834

[File Endorsement Omitted]

[Title Omitted]

OPPOSITION TO MOTION FOR AN ORDER DIRECTING THE FURNISHING OF A TRANSCRIPT AT THE EXPENSE OF THE UNITED STATES.—filed April 24, 1962

Comes now respondent by its attorney, the United States Attorney, and opposes petitioner's motion for an order directing the furnishing of a transcript at the expense of the United States, on the ground that petitioner has failed to demonstrate the need for such a transcript.

Petitioner's present counsel states that his petition appears to present at least two issues for appeal: (1) the sufficiency of the evidence to support the conviction (2) whether evidence was improperly received because seized after an illegal arrest. No facts are alleged to support either of these claims. Counsel states that "careful search of the transcript of the motion to suppress evidence made before trial, interview of the petitioner, and of both prosecuting and defense trial counsel have failed to reveal any information to support petitioner's claims or any other possible grounds for appeal." Apparently counsel has not yet consulted either the trial judge or the court reporter. In the absence of any specific factual allegations and in [fol. 9] view of counsel's failure to explore these other possible avenues of substantiating petitioner's generalized claims, the motion for a transcript at the expense of the United States should be denied at this time. Compare this Court's order in *McIntosh* v. *United States*, Misc. No. 1751, March 15, 1962. See also *Edwards* v. *United States*, 103 U.S. App.D. C. 171, 173, 256 F.2d 885, 887 (1958);

*Whitt* v. *United States*, 104 U.S.App. D.C. 1, 259 F.2d 158 (1958), *cert. denied*, 359 U.S. 937. The motion for an order extending until 30 days after receipt of the transcript the time within which a memorandum may be filed in support of the petition should also be denied.

Wherefore, it is submitted that the petition for an order directing the furnishing of a transcript at the expense of the United States be denied.

/s/ David C. Acheson
United States Attorney

/s/ Nathan J. Paulson
Assistant United States Attorney

/s/ Daniel A. Rezneck
Assistant United States Attorney

[fol. 10]

CERTIFICATE OF SERVICE [omitted in printing]

[fol. 11]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1834

[File Endorsement Omitted]

[Title Omitted]

PETITIONER'S REPLY TO RESPONDENT'S OPPOSITION—filed April 27, 1962

The Government apparently is of the view that a transcript need never be furnished unless petitioner's counsel has consulted the trial judge and the court reporters. Whatever merit there may be in this view in cases such as *McIntosh* (Opp., p. 2)—where the main issue could be adequately reconstructed by consulting the persons who were present and a small fragment of the transcript—it is palpably inapplicable where, as here (Motion, p. 2), the claim must be considered "in the light of all the * * * evidence." *Farrar* v. *United States*, 107 U.S. App. D. C. 204, 205, 275, F.2d 868, 869.

First, in such circumstances, the purpose of "conserving important judicial time" (*Edwards* v. *United States*, 103 U.S. App. D. C. 171, 173, 256 F. 2d 885, 887) and the "working time of appointed counsel, United States Attorneys, judges, witnesses and court reporters" (*Whitt* v. *United States*, 104 U.S. App. D. C. 1, 259 F. 2d 158, cert. denied 359 U.S. 937) would plainly be better served [fol. 12] by furnishing a stenographic transcript than by imposing upon counsel, the trial judge and the reporters the mammoth burden of attempting to reconstruct the entire record orally.

Second, it is utterly incompatible with the function of appellate advocacy to suggest that it can be performed adequately (*Ellis* v. *United States*, 356 U.S. 674, 675) upon *hearing* reporters read through the proceedings of an entire trial. "Frequently, issues cannot even be seen

—let alone assessed—without *reading* [and pondering] an accurate transcript." Boskey, "The Right to Counsel in Appellate Proceedings", 45 Minn. L. Rev., 783, 793 (1961). (emphasis added). Compare *Surrat* v. *United States*, 104 U.S. App. D. C. 380, 262 F.2d 691 (dissenting opinion) with *Surrat* v. *United States*, 106 U.S. App. D. C. 49, 269 F. 2d 240.

Wherefore, petitioner prays that the Court grant the motion for the furnishing of a transcript at the expense of the United States and for an extension of time as requested, or, should this motion be denied, for an extension [fol. 13] of time within which a memorandum in support of the petition may be filed until 30 days after the disposition of this motion.

Respectfully submitted,

/s/ Mozart G. Ratner
(appointed by this Court)

/s/ Joseph L. Sax
1411 K Street, N.W.
Washington 5, D. C.
Counsel for Petitioner

April 27, 1962

[fol. 14]

CERTIFICATE OF SERVICE [omitted in printing]

[fol. 15]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1961

Misc. No. 1884

District Court Criminal No. 822-61

[File Endorsement Omitted]

[Title Omitted]

Before: Wilbur K. Miller, Chief Judge, and Fahy and Bastian, Circuit Judges, in Chambers.

ORDER RE PREPARATION OF TRANSCRIPT ETC.—Dated: May 11, 1962

Upon consideration of petitioner's motion for an order directing that the stenographic transcript of proceedings be prepared at the expense of the United States and to extend the time within which he may file his memorandum in support of the petition for leave to prosecute an appeal without prepayment of costs, of respondent's opposition and of petitioner's reply, it is

ORDERED by the court that petitioner be, and he is hereby, allowed to proceed in forma pauperis to the extent of having the stenographic transcript of the testimony and evidence presented by the government prepared at the expense of the United States and that the time for filing a memorandum in support of the petition for leave to prosecute an appeal without prepayment of costs be, and it is hereby, extended until 30 days after preparation of the stenographic transcript. *Coppedge* v. *United States*, No. 157, October Term, 1961, Supreme Court of the United States, April 30, 1962.

Per Curiam.

[fol. 16]

IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1834

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR CLARIFICATION OR REHEARING—filed May 21, 1962

Upon consideration of petitioner's motion for an order directing that a stenographic transcript of the proceedings before the District Court be prepared at the expense of the government, this Court on May 11, 1962, entered an order that "the stenographic transcript of the testimony and evidence presented by the government" be prepared at government expense. The phrase "presented by the government" appears to limit the authorization to the preparation of only a portion of proceedings at the trial. Because it is believed that petitioner is entitled to a complete stenographic transcript, petitioner respectfully moves for clarification or, alternatively, for rehearing and modification of the order of May 11, 1962, to authorize the preparation, at government expense, of a stenographic transcript of the entire proceedings at the trial (*E.g.*, transcript prepared in *United States* v. *Blakeney, et al.*, D. Court Crim. No. 108-60, Court of Appeals No. 15,878, *sub. nom. Hair* v. *United States*).

[fol. 17] In *Coppedge v. United States*, No. 157, S. Ct., October Term 1961, April 30, 1962, 30 U.S. Law Week 4303, cited in this Court's order, the Supreme Court said that a defendant who petitions for leave to proceed *in forma pauperis* is entitled to appellate review no "less searching than that accorded paid apeals." 30 U.S. Law Week at 4306, 4305, 4308. Effectuation of that right requires that appointed counsel be "enable[d] * * * to attempt to make a showing * * * [whether there is] any

issue for the court's consideration not clearly frivolous." Id. at 4305. Investigation of all "the possible grounds of appeal" (*Ellis* v. *United States*, 356 U.S. 674, 675; Motion, April 17, 1962, pp. 2-3) demands nothing less than a transcript containing all the testimony and evidence, all the colloquy, comment, argument and instructions. Since a non-indigent litigant can obtain such a complete transcript to search for error, it cannot be withheld from an indigent litigant.

Plainly, this Court may not limit its consideration to the issue or issues presented below. The Supreme Court expressly held in *Coppedge* that after the Court of Appeals has appointed counsel and furnished a record it must determine whether "the applicant *then* presents *any issue* for the court's consideration not clearly firvolous." (emphasis supplied). 30 U.S. Law Week 4305 and n. 10, 4304, n. 7. Indeed this Court itself has recognized that an appeal may be based upon issues not raised in the petition. Compare *Surratt* v. *United States*, 104 U.S. App. D. C. 380, 262 F. 2d 691, 692 (dissenting opinion) with *Surratt* v. *United States*, 106 U.S. App. D.C. 49, 269 F. 2d 240, reversing the judgment of conviction. And the scope of review in this Court cannot be reduced be-
[fol. 18] cause petitioner had the assistance of counsel below. "[T]he actual record * * * might disclose issues substantial enough to constitute probable or possible 'plain error', even though trial counsel was not aware of their existence; and the indigent should have the same opportunity as the wealthy to urge that plain error should be noticed on appeal." Boskey, *"The Right to Counsel in Appellate Proceedings*, 45 Minn. L.Rev. 783, 793 (1961).

Wherefore, petitioner prays that this Court clarify or modify its order of May 11, 1962, to provide that he be furnished with a stenographic transcript of the entire proceedings at trial before the District Court at the expense of the government and that the time for filing a memorandum in support of the petition for leave to prosecute appeal without prepayment of costs be extended

until 30 days after preparation of the stenographic transcript.

Respectfully submitted,

/s/ Mozart G. Ratner
(Appointed by this Court)

/s/ Joseph L. Sax
1411 K Street, N. W.
Washington 5, D. C.

May 21, 1962

[fol. 19]

CERTIFICATE OF SERVICE [omitted in printing]

[fol. 20]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Misc. No. 1834

[File Endorsement Omitted]

[Title Omitted]

Before: Wilbur K. Miller, Chief Judge, and Fahy and Bastian, Circuit Judges, in Chambers.

ORDER DENYING MOTION FOR CLARIFICATION OR REHEARING—Dated: July 23, 1962

On consideration of petitioner's motion for clarification or rehearing, it is

ORDERED by the court that the motion be, and it is hereby, denied.

And on consideration of petitioner's request to enlarge the time to file his memorandum in support of the petition for leave to prosecute appeal without prepayment of costs, it is

ORDERED that petitioner be allowed to file the memorandum within 30 days from this date.

Per Curiam.

[fol. 21]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1834

[Title Omitted]

MOTION TO EXTEND TIME—filed August 16, 1962

Petitioner respectfully moves for an extension of time in which to file memorandum in support of the petition for leave to prosecute appeal without prepayment of costs from August 22, 1962 until September 22, 1962.

The grounds for this motion are as follows: Counsel, whose daughter has been taken seriously ill, is absent from the District of Columbia and will be unable to prepare said memorandum by August 22, 1962.

Wherefore, it is respectfully requested that an extension of time be granted until September 22, 1962.

Respectfully submitted,

MOZART G. RATNER

By /s/ David I. Shapiro
Counsel for Petitioner

August 16, 1962

[fol. 22]

CERTIFICATE OF SERVICE [omitted in printing]

[fol. 23]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Misc. No. 1834

[File Endorsement Omitted]

[Title Omitted]

Before: Wright, Acting Chief Judge, in Chambers.

ORDER EXTENDING TIME—Dated: August 27, 1962

Petitioner's unopposed motion for extension of time to file memorandum in support of petition for leave to prosecute appeal without prepayment of costs to September 22, 1962, is hereby granted.

[fol. 24]

## IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

### Misc. No. 1834

[File Endorsement Omitted]

[Title Omitted]

MOTION FOR AN ORDER DIRECTING FURNISHING OF STENOGRAPHIC TRANSCRIPT OF BALANCE OF DISTRICT COURT PROCEEDINGS OR, IN THE ALTERNATIVE, FOR ENTRY OF AN ORDER DENYING LEAVE TO APPEAL—filed September 10, 1962

On May 11, 1962, in response to petitioner's motion for a transcript of the entire proceeding, this Court directed preparation of a stenographic transcript "of the testimony and evidence presented by the government." On July 23, 1962, this Court confirmed the limitation by denial of petitioner's motion for clarification or rehearing. The undersigned has carefully examined the transcript furnished pursuant to the order of May 11, 1962. He is unable to perceive therein any non-frivolous ground for appeal.

Counsel is unable to advise the Court, however, that he has completed a "conscientious investigation" of all "the possible grounds for appeal" (*Ellis* v. *United States*, 356 U.S. 674, 675), because in his opinion, such investigation requires study of the portions of the transcript containing the testimony and evidence presented by the defendant, as well as the Judge's charge and that has not [fol. 25] been possible.[1] Accordingly, in our opinion, petitioner has not yet had that "adequate representation by counsel" which *Ellis* contemplates must be afforded before any determination can properly be made whether he is entitled to appeal *in forma pauperis*.

---

[1] Consult Boskey, *The Right to Counsel in Appellate Proceedings*, 45 Minn. L.Rev. 783, 793-796 (1961).

We are not unaware of the statement in *Johnson* v. *United States*, 352 U.S. 565, 566, that it is not essential "in every * * * case" that "the United States must furnish the defendant with a stenographic transcript of the trial." Cf. *Whitt* v. *United States*, 104 U.S. App. D.C. 1, 3-4, 5, 259 F.2d 158, 160-161, 162. In *Coppedge* v. *United States*, 369 U.S. 438, 446-447, the Supreme Court held that what must be furnished is a record of "sufficient completeness" to enable petitioner or his counsel "to attempt to make a showing that the District Court's certificate of lack of good 'faith' is in error * * *." In our view, where such a showing depends upon unearthing "plain error" (Rule 52(b)), a complete transcript is essential.

To deny indigent's counsel opportunity to comb any portion of the proceedings for such error, when opportunity to comb that portion is available to retained counsel, would appear to be the very "invidious discrimination" *Griffin* v. *Illinois*, 351 U.S. 12, and *Coppedge*, 369 U.S., at 445, note 13, forbid. Indigents have the same right as non-indigents to rely on "plain error," in whatever portion of the proceeding committed. "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." [fol. 26] *Griffin* v. *Illinois*, 351 U.S., at 19. As Mr. Justice Frankfurter put it, 351 U.S., at 23, indigents cannot be precluded from securing the same review available to others "by disabling them from bringing to the notice of an appellate tribunal errors of the trial court which would upset the conviction were pretrial opportunity for review not foreclosed." To deny a transcript of any portion of the proceeding is *pro tanto* to deny opportunity for review of plain error in that portion.

Of course, to require the Government to furnish a complete transcript whenever indigent's counsel conceives it necessary to performance of his advocate's function (*Ellis* v. *United States*, 356 U.S., at 675), will put the government to expense without any assurance that a non-frivolous ground will be found. But that is unavoidable, for nothing short of study of the complete transcript will disclose whether unnoticed plain error was committed or not. In this respect furnishing a complete transcript

before deciding whether an indigent has a right to appeal is like having a trial before rendering judgment. "Lawsuits often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52.

The choice lies between imposing on the government the cost of furnishing a complete stenographic transcript in all cases where counsel desires to search for plain error, and denying leave to appeal although plain error may exist. We think there is really no alternative: governmental economy cannot be weighed in the same ju-
[fol. 27] dicial scale with "equal treatment for every litigant before the bar." *Coppedge*, 369 U.S., at 447.

Since in the present posture of the case we cannot conscientiously request leave to withdraw (*Ellis* v. *United States*, 356 U.S., at 675), we respectfully move for a transcript of the portions of the proceeding not heretofore furnished and, if this request is denied, pray that this Court enter an order denying petitioner leave to appeal *in forma pauperis*. Cf. *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 680-681.

Respectfully submitted,

/s/ Mozart G. Ratner
(Appointed by this Court)
1411 K Street, N.W.
Washington 5, D. C.
Counsel for Petitioner

September 20, 1962

[fol. 28]

CERTIFICATE OF SERVICE [omitted in printing]

[fol. 29]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Misc. No. 1884

[File Endorsement Omitted]

[Title Omitted]

RESPONSE TO PETITIONER'S MOTION FOR AN ORDER DIRECTING FURNISHING OF ADDITIONAL TRANSCRIPT—filed September 26, 1962

Respondent by its attorney, the United States Attorney, respectfully advises the Court that it does not intend to submit an opposition to the instant motion.

/s/ David C. Acheson
United States Attorney

/s/ Frank Q. Nebeker
Assistant United States Attorney

CERTIFICATE OF SERVICE [omitted in printing]

[fol. 30]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Misc. No. 1834

[File Endorsement Omitted]

[Title Omitted]

Before: Miller, Fahy and Bastian, Circuit Judges, in Chambers.

ORDER DENYING MOTION FOR STENOGRAPHIC TRANSCRIPT OF THE BALANCE OF THE DISTRICT COURT PROCEEDINGS—
Dated: October 24, 1962

On consideration of petitioner's motion for an order directing furnishing of stenographic transcript of balance of District Court proceedings or, in the alternative, for entry of an order denying leave to appeal, and of respondent's answer thereto, it is

ORDERED by the court that petitioner's motion for stenographic transcript of the balance of the proceedings in the District Court is hereby denied.

Per Curiam.

Circuit Judge Fahy would grant the motion.

[fol. 31]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

Misc. No. 1834

District Court Criminal No. 822-61

[File Endorsement Omitted]

[Title Omitted]

Before: Bazelon, Chief Judge, in Chambers.

ORDER AUTHORIZING CLERK TO PREPARE A CERTIFIED RECORD ETC.—Dated: November 23, 1962

On consideration of petitioner's unopposed motion to authorize the Clerk to prepare a certified record for use on petition for writ of certiorari, it is

ORDERED that the Clerk is hereby authorized to prepare a certified record in this case for use on petition for writ of certiorari in the Supreme Court of the United States, without prepayment of costs.

[fol. 32]

DESIGNATION OF RECORD [omitted in printing]

[fol. 33] • • •

[fol. 34]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 35]

SUPREME COURT OF THE UNITED STATES

No. 783 Misc., October Term, 1963

ZEBEDEE HARDY, PETITIONER

*vs.*

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—April 29, 1963

On Consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1060 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as through filed in response to such writ.

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# Supreme Court of the United States

OCTOBER TERM, 1963

No. 112

ZEREDER HARDY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari To The
United States Court of Appeals
for the District of Columbia Circuit

## BRIEF OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE

JOHN H. PRATT
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*President, Bar Association of the District of Columbia*

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Washington, D. C.
*Of Counsel*

## INDEX


| | Page |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| QUESTION PRESENTED | 2 |
| THE INTEREST OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA | 3 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | 6 |
| The Court of Appeals should be required as a matter of course to furnish a complete trial transcript to an indigent defendant seeking leave to appeal a criminal conviction *in forma pauperis* | 6 |
| CONCLUSION | 13 |
| APPENDIX | A-1 |


### CITATIONS


CASES:

| | |
|---|---|
| *Coppedge* v. *United States*, 369 U.S. 438 (1962) | 3, 5, 6, 7, 8 |
| *Griffin* v. *Illinois*, 351 U.S. 12 (1956) | 6 |
| *Ingram* v. *United States*, U.S. App. D.C., 315 F. 2d 29 (1962) | 1, 6, 8 |

STATUTES:

| | |
|---|---|
| 28 U.S.C. 2255 | 13 |
| 28 U.S.C. 753 (b) | 13 |

MISCELLANEOUS:

| | |
|---|---|
| *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, 1963* | 9 |
| Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783 (1963) | 9 |

# Supreme Court of the United States

OCTOBER TERM, 1963

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**No. 112**

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ZEBEDEE HARDY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

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**On Writ of Certiorari To The United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE

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This brief is filed by the Bar Association of the District of Columbia as *amicus curiae*, pursuant to the written consents of Petitioner and Respondent which are on file with the Court.

### OPINION BELOW

No opinion in this case was filed by the Court below. The *per curiam* orders of the United States Court of Appeals for the District of Columbia Circuit are reproduced in the record at pp. 11, 15 and 22, and are not officially reported.

The attention of the Court is, however, directed to the contemporaneous opinion of the Court below in a similar case, in which that Court described the procedure it has adopted for the disposition of the questions presented by this case: *Ingram* v. *United States*, ___ U.S. App. D.C. ___, 315 F. 2d 29 (1962).

## JURISDICTION

On February 16, 1962, Petitioner was sentenced in the United States District Court for the District of Columbia to concurrent prison sentences of up to five years following his conviction for violations of the narcotics laws. On February 19, 1962, the trial judge denied Petitioner's application for leave to appeal *in forma pauperis*. The application was renewed on March 16, 1962, in the United States Court of Appeals for the District of Columbia Circuit, the Chief Judge of which appointed counsel to represent Petitioner in connection with his application. Following a series of motions (described in greater detail in Petitioner's brief), counsel moved, on September 20, 1962, for a court order directing that Petitioner be furnished, at the expense of the United States, with a transcript of those portions of the trial proceedings not previously furnished, or, in the alternative, for an order denying him leave to appeal *in forma pauperis*.

On October 24, 1962, the Court of Appeals denied so much of the motion as requested the balance of the transcript of the trial proceedings at government expense. The Court took no action on the remainder of the motion. The petition for a writ of certiorari was filed on November 30, 1962, and was granted on April 29, 1963. Jurisdiction is based on 28 U.S.C. § 1254(1).

## QUESTION PRESENTED

In direct appeals *in forma pauperis* from criminal convictions, does the practice of the U. S. Court of Appeals for the District of Columbia Circuit of furnishing appointed counsel with a partial transcript of the trial proceedings containing only the evidence presented by the Government, unless counsel can show a need for additional portions, comport with the Constitutional requirements of due process, with the standards of fairness and enlightenment expected of federal criminal procedures and with the direc-

tions of this Court as articulated in *Coppedge* v. *United States*, 369 U.S. 438 (1962)?

## THE INTEREST OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

Every practitioner of law, indeed every citizen of the United States, should be deeply concerned with the procedures under which criminal justice is administered in the federal courts. The problems of devising fair procedures are highlighted in the District of Columbia Circuit because of the unique jurisdiction of the federal courts sitting in the federal enclave. As these Courts are vested with exclusive jurisdiction to hear and determine all criminal cases arising in the District of Columbia, they must dispose of more than 10,000 cases per year. Approximately 1,300 of these concern felony charges and represent somewhat over 4% of all criminal cases considered by all of the federal district courts. But because of the nature of the crimes charged, encompasing all of the so-called "common law" offenses such as murder, rape, robbery, and assault, pleas of not guilty and jury trials are more common in this jurisdiction than in the courts of the remainder of the federal system, which are concerned almost exclusively with trying cases under the federal Criminal Code. As a corollary of these facts, a greater number of appeals is sought and obtained in this Circuit. Of approximately 600 appeals in criminal cases considered annually by all eleven United States Courts of Appeals, up to 20% are heard in the District of Columbia Circuit.

Statistics recently collected by the Chief Judge of the Court of Appeals for the District of Columbia Circuit indicate that criminal or quasi-criminal proceedings conducted in or before the District of Columbia Court of General Sessions, the United States District Court, the District of Columbia and United States Courts of Appeals,

the Juvenile Court, the Mental Health Commission, the Coroner, and the United States Commissioner generate an annual requirement of at least 10,000 assignments of counsel to represent indigents per year. Thus, the administration of *criminal* justice alone in this Circuit would appear to require every non-government lawyer admitted to the Bar and practicing in the District of Columbia to accept assignment in two cases each year. For many reasons the number of lawyers who are actually available to, and who do participate in the representation of indigents in criminal proceedings, is far smaller than the potential pool of 5,200 attorneys.

These facts highlight the ~~inefficiency~~ inefficacy of present practices and procedures in the local courts and, to the extent that these courts serve as models for their sister tribunals in the federal system, raise serious questions about the administration of criminal justice generally throughout the federal system. As the largest Bar Association in the District of Columbia, with some 3,600 active members, this Association is deeply concerned with the utilization of donated lawyers' services on behalf of indigents. The Association similarly has a particular obligation to its members and to the Courts to devise methods whereby lawyers' efforts can most effectivly and efficiently be used in the quest for equal justice for all who apepar in court faced with criminal charges.

The question presented by this case focuses upon a single onerous and, in the Association's view, unnecessary, procedure adopted by the United States Court of Appeals for the District of Columbia Circuit—a procedure whereby counsel appointed to represent the indigent appellant gets a trial transcript—if at all—only in bits and pieces, and then only by making a showing which the abscence of a transcript makes difficult or impossible. As this practice vitally affects the manner in which the local bar can dis-

charge its obligations under existing procedures for the assignment of counsel to represent indigents—quite aside from its effects on the administration of criminal justice—the Association feels it should express its views to the Court.

## SUMMARY OF ARGUMENT

The current practice of the Court of Appeals for the District of Columbia Circuit, of furnishing counsel appointed to represent indigents seeking leave to appeal *in forma pauperis* with a partial trial transcript containing only the testimony and evidence presented by the government, unless counsel can show a need for additional portions, does not comport with the standards of fairness and due process demanded in federal criminal procedures or with the commands of this Court as recently enunciated in *Coppedge* v. *United States*, 369 U.S. 438 (1962).

The Bar Association of the District of Columbia is deeply concerned with the serious constitutional questions necessarily raised by a practice which denies to a convicted defendant, by reason of indigency alone, the same complete record of trial proceedings which otherwise would automatically be available. Members of the Association frequently called upon to represent such clients cannot give to the indigent defendant the full measure of his right to counsel without a complete transcript. In spite of the extra time and energy counsel may expend in an effort to reconstruct portions of the trial not transcribed, the task is an impossible one and should not be imposed. And appointed counsel cannot safely discharge his obligation of investigating all possible grounds for appeal, in view of the complexities of modern criminal law, without knowing precisely what took place at trial.

Finally, it seems only appropriate that the cost of providing a full transcript be shared by society without im-

posing on appointed counsel the unnecessary burden and wasteful effort involved in attempting to recreate an appellate record from the fallible memories of interested trial participants.

## ARGUMENT

### THE COURT OF APPEALS SHOULD BE REQUIRED AS A MATTER OF COURSE TO FURNISH A COMPLETE TRIAL TRANSCRIPT TO AN INDIGENT DEFENDANT SEEKING LEAVE TO APPEAL A CRIMINAL CONVICTION IN FORMA PAUPERIS

By now this Court is familiar with the successive hurdles which the indigent defendant in a criminal case must overcome en route from sentencing in the District Court to a decision *on the merits* by the Court of Appeals. See *Coppedge* v. *United States*, 369 U.S. 438 (1962). In an apparent desire to fix the procedural ground rules governing *in forma pauperis* appeals, following *Griffin* v. *Illinois*, 351 U.S. 12 (1956), this Court in *Coppedge* went "beyond the corners of 28 U.S.C. § 1915" and spelled out in elementary detail the procedures to be used and the standards to be applied "to assure equality of consideration for all litigants"—whether their criminal appeals be prepaid or *in forma pauperis*. Nevertheless this Court is now faced still again with the task of instructing the Court of Appeals that its application of *Coppedge* is inadequate.

With respect to the merits of petitioner's case, we are satisfied that the matter will be more than adequately presented to this Court by the parties.[1] We therefore focus our remarks on the effect of the Court of Appeals' post-

[1] Suffice it to say that the ruling of the court below, as articulated in *Ingram* v. *United States*, ____ U.S. App. D.C. ____, 313 F. 2d 29 (1962), represents at best a truncated reading of the language and an insensitivity to the spirit of *Coppedge;* at worst, the *Hardy-Ingram* procedure of granting fragmented transcripts defies the burden of proof strictures laid down with particularity in *Coppedge*. *Coppedge* v. *United States*, 369 U.S. at 447-48.

*Coppedge modus operandi* on those attorneys in the District of Columbia who have in the past given and continue to give so generously of their time and energy in the handling of *in forma pauperis* appeals.

This Court in *Coppedge* evidenced its deep sensitivity to, and clear understanding of, the difficulties facing the indigent appellant. The Court stated:

> "Particularly since litigants *in forma pauperis* may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition, is appellate review of their cases any less searching than that accorded paid appeals inappropriate." *Coppedge* v. *United States*, 369 U.S. at 450.

And this Court put the Court of Appeals on notice that fragmented consideration of indigent appeals was, to say the least, unsatisfactory. After noting that "[d]elay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement," *id.* at 449, the Court found:

> "[S]tatistics demonstrate the inevitable delay that surrounds a procedure in which the courts give piecemeal attention to the series of motions that indigents must make before final adjudication of the merits of their cases is reached. Delays described in years between trial and final decision in criminal cases are the unhappy result of separate considerations of motions for the appointment of counsel, for the preparation of a transcript of the trial proceedings and, ultimately, for the leave to appeal *in forma pauperis*." *Id.* at 450.

It was left to the concurrence in *Coppedge* to spell out what was implicit in the Court's articulation of the burden of proof, the Court's visible concern for the inherent dis-

advantages suffered by indigents and the Court's distaste for delay. Justice Stewart urged:

> "[E]ach Court of Appeals might well consider whether its task could not be more expeditiously and responsibly performed by simply granting applications to appeal from criminal convictions *in forma pauperis* as a matter of course, and appointing counsel to brief and argue each case on the merits. The Government would then be free in any case to file before argument a motion to dismiss the appeal as frivolous, as every appellee is always free to do. In the absence of such a motion an appeal which after argument appeared clearly without merit could be expeditiously disposed of by summary affirmance, in the secure knowledge that all the issues had been fully canvassed. This procedure, it seems to me, would obviate the many difficulties which, as the present case shows, the complicated two-step system is all too likely to produce." *Id.* at 458.

As a predicate to the foregoing suggestion, the concurrence noted:

> "It is a serious imposition upon appointed counsel to require the dissipation of energy and time in preliminary skirmishing." *Id.* at 457.

But it is precisely this "preliminary skirmishing" that the Court below has now elevated to a procedural rejuirement. Although in the instant case no opinion or per curiam memorandum was filed, the Court of Appeals subsequently detailed the procedural steps it believed would satisfy *Coppedge*. In *Ingram* v. *United States*, ____ U.S. App. D.C. at ____, 315 F. 2d at 30-31, the court below stated:

> "Accordingly, we have devised the following implementing procedure: when a *pro se* petition is filed, upon direct appeal from judgment of conviction, and the claims of error stated therein (e.g., 'insufficiency of evidence,' 'unlawful search and seizure,') are so conclusory in nature that 'their substance cannot adequately be ascertained,' counsel will be appointed and,

simultaneously, the portion of the transcript of proceedings which relates to the conclusory allegations will be ordered so that appointed counsel may determine their merit. Of course, counsel will not be limited to the transcript initially allowed if he can in good conscience advance other claims of error requiring additional portions of the transcript.

"By this procedure much of the attributed 'inevitable delay' caused by 'piecemeal attention to the series of motions that indigents must make' is ended. It is based on our belief that the Coppedge opinion does not require a complete transcript to be prepared in every case, and that to obtain even a partial transcript some showing of error, if only vague and conclusory, must be made."

In urging that this Court hold (1) that the foregoing interpretation of *Coppedge* is incorrect and (2) that full trial transcripts must be furnished at government expense as a matter of course to each defendant seeking leave to appeal his conviction *in forma pauperis*, we can do no better than to direct this Court's attention to Chapter IV of the *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice*, submitted February 25, 1963 (hereinafter REPORT), and to the report of a special committee of the Junior Bar Section of the Bar Association of the District of Columbia, cited at REPORT, c.IV, p. 118, n.30, and included as an appendix to this Brief. See also Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 791-94, 802 (1961).

After concluding on the basis of a statistical examination of the federal criminal dockets—including the appellate criminal docket in the Court below—that abandoning the *in forma pauperis* "screening" process (essentially the suggestion in the *Coppedge* concurrence) would not in fact overburden either the appellate bench or the Federal Treasury (see REPORT, pp. 94-96, 104-110, 115), the REPORT noted

the adverse effects on appointed counsel and their indigent clients of perpetuation of the "screening" process.

> "Since the justification of the 'screening' procedures presently employed in the federal courts must rest upon their supposed economies of money and effort, it becomes pertinent to examine in some detail the practical operation of the system. The Committee believes that the alleged economies are largely illusory and that the screening procedures produce other consequences imperiling the equity and efficiency of the administration of federal justice in the appellate area." *Id.* at 99.
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> . . . . . .
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> "If the papers presented to the appellate court establish defendant's right to appeal *in forma pauperis* the application should be granted. Often, however, the situation is one in which the papers submitted by the defendant *pro se* are not adequate to permit the court of appeals to come to a decision. At least since the decision of *Johnson* v. *United States* in 1957, it has been clear that the court is under obligation to appoint counsel in defendant's behalf and that counsel must be permitted to advance reasons why leave to appeal should be granted. Counsel appointed in such a case receives no compensation for his services and is often confronted by difficult and time-consuming obligations. Since the lawyer appointed in the court of appeals is not likely to have participated in the trial of the case, he will ordinarily lack personal knowledge of the occurrences at trial. He must, therefore, seek to provide some basis to determine whether defendant's points are frivolous or possess substance, such as entering into an agreed statement of facts with the prosecutor, requesting the court reporter to read back all or portions of the shorthand notes of the trial, or inspecting the notes of the trial judge if such exist and are made available. 'Such efforts are apt to be incredibly time-consuming and frustrating, and sometimes may arouse in counsel a feeling that he would be well advised to avoid future assignments of appellate *in forma pauperis* work. But worse than that, in many instances

these efforts will be wholly unsatisfactory as a means of safeguarding the defendant's rights.'

"Often counsel will conclude that the only 'appropriate means' of determining the character of defendant's grounds for appeal is a trial transcript. A motion to this effect with accompanying memorandum must be filed. Typically the request will be opposed by the Government. In many cases the transcript, even when supplied, will be only partial, thereby depriving defendant of the possibility of reversal on the ground that the record contains 'plain error' of which the defendant was unaware and of which he might have had the benefit had he possessed means adequate to purchase a complete transcript." *Id at* 101.

. . . . . .

"It will be observed, first, that the existing procedures are enormously expensive in time and effort. The efforts of assigned counsel to search out, in the absence of an adequate transcript of the trial, a sufficient basis for granting leave to appeal is wasteful not only of the lawyer's time, but that of the officials whom he must contact and interview for this purpose. Every application for leave to appeal involves the potential of at least two judicial proceedings, one in the district court and one in the court of appeal, even when a further hearing on the merits is never reached. In some situations, however, many more than two proceedings occur, some leading to full-scale opinions—again, without the merits of the appeal being reached. Perhaps the most oppressive burdens of time and effort fall on assigned counsel. In the District of Columbia alone, 108 appointments of counsel were made in these cases in 1958; and many other appointments have been made in other circuits. It is not far from the truth to say that the federal system seeks to avoid the expenses of supplying transcripts to all financially disadvantaged defendants desiring to appeal by shifting the burdens to lawyers required to serve without compensation or reimbursement of expenses. Nor can the system be defended as an effective device to protect the legitimate

interests of convicted defendants. As pointed out above, the system operates at various points to provide the defendant required to invoke the *forma pauperis* procedures with less than equal opportunities to invoke full appellate review." *Id.* at 102.

. . . . . .

"The Committee believes that proper evaluation of comparative costs requires that attention be directed to the 'hidden costs' of the present system. First there are the costs in judicial time in the district courts and courts of appeals, just noted, that result from the administration of the present system. Second are the costs in the time of public officials required to be interviewed by assigned counsel in his effort to establish a record or to justify the ordering of a transcript in proceedings involving leave to appeal *in forma pauperis*. Third are the costs of time, effort, and expense of assigned counsel. The present system is able to function at all only by shifting a large part of the burdens of the system on lawyers who are required to serve without compensation or reimbursement." *Id.* at 114.

We believe the reasoning of the REPORT to be cogent and the conclusion to be correct. We urge this Court now to exercise its supervisory powers and to direct, at a minimum, that a full trial transcript be prepared automatically upon the filing of a notice of appeal and application for leave to appeal *in forma pauperis*.[2]

One further point must be made in urging that a complete trial transcript be provided as a matter of course in

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[2] The cost factor in the procedure we urge this Court to adopt is, of course, not to be overlooked. But also, of course, that factor cannot be allowed to stand in the way of the proper—of the Constitutional—administration of justice. The problem of costs is explored in greater detail in Section 3 of the Junior Bar Section's Report, Appendix pp. A-8—A-13, *infra*. It was the conclusion of the committee preparing that Report that the "automatic" allowance of full transcripts would not appreciably raise the *total* cost of criminal appeals—and might even result in the eventual conservation of both funds and judicial time.

every indigent's direct appeal of a judgment of conviction. On the basis of our experience as appointed counsel, we believe strongly that providing a trial transcript in every case will significantly reduce the number of collateral attack proceedings under 28 U.S.C. 2255, habeas corpus, or coram nobis. (See REPORT, pp. 109-110, 114.) And even if the number of collateral proceedings is not significantly reduced by automatically providing transcripts (copies of which would have to be filed with the records of the court, see 28 U.S.C. 753(b) ¶ 4), it is clear in our judgment that the amount of time spent by the bench, the bar and the prosecutor in disposing of such collateral actions will be sharply curtailed and that such actions will be disposed of with far greater confidence that a just result has been properly achieved.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the court below dated October 24, 1962 should be vacated and the cause remanded to that court with instructions that it direct Respondent to furnish Petitioner a stenographic transcript of the proceedings in the trial court as yet not transcribed.

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# APPENDIX

# APPENDIX

**Report of a Special Committee of the Junior Bar Section of the Bar Association of the District of Columbia to the Attorney General's Committee on Poverty and the Administration of Criminal Justice.**

**Peter D. Ehrenhaft, Chairman**
**Daniel J. Freed, ex officio**
**Louis M. Kaplan, David Rubin,**
**Richard S. Salzman, Daniel M. Singer**

**January 15, 1963**

## APPEALS

The Supreme Court has stated that in federal criminal cases, an appeal from a judgment of conviction is a "matter of right." *Coppedge* v. *United States*, 369 U.S. 438 (1962). The decision in *Coppedge* culminated a series of opinions reflecting the Court's increasing concern with the obstacles faced by poor persons seeking to exercise their "right" to appeal in the federal courts.[1] As there stated the Court has sought to provide the lower federal courts with a "usable standard" for meeting the two-pronged problem of discouraging frivolous litigation in crowded courts while avoiding "invidious discrimination" against indigent litigants.

The question of discrimination has arisen in the light of provisions of the Judicial Code and Federal Rules of Criminal Procedure which, in effect, modify the poor person's "right" to appeal. Financial requirements are an integral part of the current rules concerning the docketing of an appeal in the Court of Appeals, preparing a transcript

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[1] The cases are collected in footnote 1 of the Court's opinion. See also note 13, collecting and comparing cases which arose in the state courts.

of the trial proceedings and furnishing a record on appeal. The appellant with funds can meet these requirements and, upon satisfaction of other procedural requisites, can, without further court action, appear before the Court on the merits of his appeal. The indigent, on the other hand, must apply for a Court order directing that the costs of prosecuting the appeal be borne by the United States. In addition, the indigent will generally be required to petition the Court for an appointed counsel.

The successive consideration of motions for the appointment of counsel, for the preparation of a transcript and for leave to proceed on appeal without payment of costs has resulted in substantial delays in the disposition of appeals *in forma pauperis*. More seriously, this practice has subjected indigents' cases to a fragmented screening process not applied to the cases of appellants able to meet the costs of perfecting their appellate rights. In *Coppedge*, the Supreme Court strongly suggested that constitutional considerations of equal protection of the laws and due process would require invalidation of procedures subjecting the appeals of the poor to more exacting scrutiny than that accorded the affluent. Indeed, it added the thought that since indigent litigants, due to their lack of resources, generally experience greater difficulties in the defense of their cases at the trial level, burdening their rights to secure appellate review was "particularly inappropriate." The majority intimated and the concurring Justices explicitly stated that a system of completely "automatic" appeals would both meet the constitutional problem and, at the same time, save time and money now spent in screening indigents' cases. The opinion of the Court in *Coppedge* cited statistics to support the propositions that *in forma pauperis* criminal appeals are not, as a class, less likely to present legal questions meriting appellate review than cases in which the appellant has paid the costs on appeal, and that the current fragmented processing of appeals *in*

*forma pauperis* unduly delays the final disposition of some cases as much as six years.[2]

The statistics cited by the Supreme Court in *Coppedge* are, of course, illustrative only. On the issue of the frivolity of i.f.p. litigation as a class, the figures are taken from the single jurisdiction, the District of Columbia Circuit, in which the problem of *in forma pauperis* criminal appeals has received the greatest attention.[3] However, this data was not the product of any systematic collection of facts. The truth of the matter is that adequate statistics for studying the disposition of indigents' appeals and for determining the adequacy of current practices—or alternatives—are not presently available. Neither the courts nor the Department of Justice maintain systematized records of the number of persons seeking leave to proceed *in forma pauperis*, the number of persons granted such leave, the costs—in terms of money and the time of counsel, United States Attorneys, judicial personnel and others—expended under the current practice, or the total time elapsed for the disposition of criminal cases *in forma pauperis* as compared to cases in which the defendant pays costs. Without

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[2] The case of *Coppedge*, himself, is illustrative. Indicted in June 1958, it was only in December 1962 that he reached the stage of filing a petition in the Supreme Court for a writ of certiorari to review on the merits the Court of Appeals' affirmance of his conviction.

[3] The unique jurisdiction of the federal courts in the District of Columbia accounts for this fact. Thus, the United States District Court for the District of Columbia does not hear the most criminal cases of all federal district courts, since misdemeanors and petty offenses are tried in a municipal court, whereas other district courts do try all such cases not heard by a United States Commissioner with jurisdiction only over petty offenses. On the other hand, trials of "common law felonies" such as murder, arson, rape and robbery are heard with regularity in the U.S.D.C.D.C., whereas other district courts are concerned almost entirely with the "federal crimes" ranging from sabotage and narcotics smuggling to tax evasion and illegal immigration. Disposition of the latter type of case by guilty pleas is more likely than in the former type, with a resulting lower number of criminal appeals arising from the courts considering primarily the usual federal crimes.

such statistics it is difficult to determine whether changes in present practices would cost more or less or the extent to which changes would expedite appellate review of all criminal cases. A thorough study of the problem, based on, say, five years' experience in the District of Columbia and one or two other Circuits, would appear to be money well spent.

Nevertheless, certain facts are presently available which support the view suggested in *Coppedge* that a system of "automatic" appeals is not only the most just but also the most economical in the long run. The study of criminal appeals over an 18-month period conducted by Chief Judge Bazelon of the Court of Appeals for the District of Columbia Circuit, was cited by the Supreme Court to demonstrate that (1) The volume of direct criminal appeals, even in the federal jurisdiction accounting for almost one-third of all criminal appeals now being heard, is not very large. In his study, Judge Bazelon found that the Court had heard 86 criminal appeals in 15 months. A more recent study, conducted by the Clerk of the same Court, found that in the fiscal year 1961, the Court disposed of 84 criminal appeals, including 7 which the Court merely docketed and then dismissed for lack of prosecution;[4] (2) Appeals of indigents result in reversals, divided affirmances and unanimous affirmances in approximately the same ratio as appeals by appellants paying costs. In addition, the Supreme Court cited examples based on its own study of the numerous steps required to dispose of some of the criminal cases in which it had addressed itself to the *in forma pauperis* problem,[5] and suggested that the costs of the present systems in terms of time and effort, as well as in public funds,

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[4] See also chart #5, *infra*, compiling an informal study by a Washington attorney in preparing an article on a related subject.

[5] See note 17, 369 U.S. at 452, describing the histories of the *Johnson*, *Farley* and *Ellis* cases.

can be considerable and perhaps even greater than those necessary to support automatic appeals.

The committee has attempted to utilize additional available information to determine the extent to which these propositions are substantiated.

1. **The volume of criminal appeals in the federal courts is not large.**

The various informal studies considered by the committee, such as the one of Judge Bazelon cited in *Coppedge*, indicate that the number of criminal appeals in the federal courts is considerably smaller than is commonly believed. This indication is further substantiated by statistics taken from two other, more comprehensive sources: the annual reports of United States Attorneys of the Department of Justice and of the Director of the Administrative Office of the United States Courts. The figures from these reports, tabulated in an appendix to this chapter, show a greater volume of litigation than is reported by the ad hoc studies of Judge Bazelon, the Clerk of the D. C. Circuit and Mr. Boskey; and the United States Attorneys reports indicate higher figures than those of the Administrative Office. Account for these disparities lies in a lack of uniform statistical criteria, e.g., variable inclusion as "terminated" criminal "appeals" of denials of leave to appeal *in forma pauperis*, and of appeals from denials of post conviction collateral motions, such as habeas corpus or under 28 U.S.C. § 2255.[8] These factors, alone, suggest the need for a better

[8] For example, as will be noted from chart 2, the Administrative Office of the Courts Report for fiscal year 1961 lists 91 terminated criminal appeals by the D. C. Circuit. This was the figure submitted by the Clerk of that Court. However, his personal study of this problem revealed that this number included five appeals from orders denying relief under 28 U.S.C. § 2255, one from an order denying a writ of error coram nobis and one from an order revoking probation. The number of 84 "terminated" appeals does not include terminations effected, from the would-be appellants' point of view, by denials of leave to appeal *in forma pauperis*.

continuing and uniform statistical service.

But allowing for the widest margins of error, and recognizing that these statistics tend to inflate the actual number of cases considered by the courts, the volume of direct criminal appeals remains both surprisingly constant and relatively small. They reveal that we are speaking here of a problem which, under current practices, embraces less than 800 cases in the entire federal court system per year. Further, if the recommendations of the committee were adopted, providing for the automatic appellate review of all criminal convictions in which appeals are likely to be sought, the number of such cases could, conceivably, increase only four or five times the present total. This computation assumes that no defendant found guilty after trial would be deterred from appealing his conviction on such various grounds as his appeal could delay completion of service of his sentence, his sentence will have expired before completion of appellate review, or a mere disinclination to litigate the matter further. But even assuming that *every* defendant found guilty after trial would seek to perfect a complete appeal at government expense, we are still speaking of less than 3500 cases throughout the United States per year, and of a figure representing less than 10% of all the persons against whom original criminal proceedings in a federal court are brought each year.[7]

**2. Indigents' appeals are no less meritorious than "paid appeals."**

It is clear that underlying the present system of piecemeal appellate consideration of criminal appeals *in forma pauperis* is the thought that an indigent, with no personal

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[7] As the disparity on charts 1 and 2 between criminal "cases" and criminal "defendants" terminated indicates, many "cases" cover more than one defendant. Thus, too the number of appeals would be smaller than the number of "defendants" and would be more closely linked to the number of "cases" terminated with convictions after trial.

fortune at stake in continuing litigation, is more likely to abuse his right of appeal than the person who must pay for proceeding further. The existing procedure is intended to provide the brake to frivolous litigation by indigents which it is supposed that financial considerations impose on the more affluent. Aside from the doubtful constitutionality of that thesis, the committee questions its truth in fact. Recognizing that an appeal will arise only out of a *contested* indictment, it seems reasonable to believe that most persons able to pay therefor, having lost at the trial level and facing imprisonment or even execution, will continue litigating as long as they have any hope of securing reversal of their convictions. Their hopes may give rise to appeals as meritorious or as frivolous as indigents'. Money would appear to be a minor consideration at that juncture.

In fact, Judge Bazelon's study found no relation between i.f.p. appeals and their ultimate disposition, that differed substantially from the disposition of paid appeals. The Clerk of the D. C. Circuit found, in his study, that of 84 appeals in fiscal 1961, 22 were paid, 7 were docketed by the Court and dismissed for failure of prosecution and 55 were allowed *in forma pauperis* either by the District Court or the Court of Appeals. His study found, further, that of the 22 paid appeals, 16 were affirmed, 3 reversed, 1 dismissed without prejudice, 1 dismissed by the appellant and 1 dismissed as frivolous by the Court. The Administrative Office Report for the same year notes that 57 criminal appeals were affirmed, 2 dismissed, 10 reversed and 2 received other disposition. Although some errors in these computations have been noted, the figures are useful to show that the approximate ratio of 1 reversal to every 6 affirmances among the paid appeals was similar to that in indigents' cases, in which the 7 remaining reversals must have been ordered to a maximum of 48 affirmances and dismissals.

It may be assumed that if appeals were heard "automati-

cally" the ratio of reversals to affirmances and dismissals would be increased. However, even if it were to reach a proportion of 1:20, a three fold "improvement" over current practice, it is the view of the committee that the federal courts should not perpetuate a system that prevents hearing a man with as much as a 5% chance to secure vindication of his rights merely because he is poor. As the Supreme Court pointed out in *Coppedge*, the indigent has probably suffered increased disabilities at the trial level directly related to his poverty. It is improper to increase his burden in securing appellate review, when he probably has the greatest need for it.

**3. The cost of automatic appeals will not be substantially greater than the cost of the present system.**

The "cost" of appellate review is difficult to define, much less determine with accuracy. Broadly speaking, however, the concept should include the out-of-pocket expenses of the defendant for perfecting his appeal, including the price of a trial transcript and docketing fees, as well as the salaries and time of court reporters, defense and appellate counsel, government attorneys, the court's staff and, of course, the judges who hear the case. The present system of dealing with indigents' cases would appear to take inadequate account of every factor other than the first which, in an i.f.p. case is borne by the government. As is revealed by the histories of *Coppedge* and the other cases cited by the Court in its opinion in that case, an inordinate consumption of the time of counsel, court personnel and judges is required by the existing "screening" process, the aim of which is to save funds but which, in fact, appears to save them only in the area of transcripts and docketing fees. The time devoted to the consideration of each of the required steps in those and comparable cases could, it seems to the committee, have been far better spent in reviewing on the merits the appeals of all those who sought to appeal

despite the added cost of transcripts. This is particularly true since, as was reported to Mr. Boskey by most of his correspondents, a majority of the applications to take direct appeals *in forma pauperis* is allowed after all of the preliminary screening is completed.

The principal direct expense to the government arising out of appeals *in forma pauperis* is the cost of transcribing verbatim records of the trial proceedings under review.[8] The disposition of most criminal appeals requires a review of such a transcript, and the cost of transcribing proceedings runs to approximately $1 per page.[9] However, only a portion of that dollar is fairly attributed to the defendant, since the government will generally purchase a transcript in the event a defendant purchases his own for purposes of appeal. The cost of a complete transcript naturally varies with the length of the trial. As chart 2 indicates, a vast majority of all criminal trials is concluded in less than 3 days. A transcript of a three-day trial will generally cost less than $200 to prepare, and the Administrative Office of the United States Courts reports that a large majority of the transcripts ordered in i.f.p. appeals cost less than $100—not including the additional cost of the

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[8] A further, sometimes major, cost is that of preparing and printing a joint appendix of relevant portions of the transcript and record. The Clerk of the District of Columbia Circuit has reported that in *in forma pauperis* appeals, about two-thirds of the cost of preparing the joint appendix should be, and for accounting purposes is, attributed to the appellant. However, many techniques can be used to minimize the cost of reproducing the relevant portions of the record for the use of the Court—once the transcript is available.

[9] The cost varies from jurisdiction to jurisdiction. The $1 per page fee would pay for 3 copies in the District of Columbia—1 for the appellant, 1 for the government and 1 for the court. The latter is, pursuant to 28 U.S.C. § 753(b), a free copy which the court reporter must deliver to the court when he transcribes any record for a litigant. The court reporter is also obligated by the cited statute, to transcribe and deliver free of charge for the court's records, a transcript of all arraignments and sentencing procedures.

government attorney's copy. During fiscal 1962 the total cost of all transcripts for i.f.p appeals—including some collateral appeals—was $110,000, although this sum included a single $22,000 item for the transcript of a trial which took almost a year to complete. In fiscal 1961, 330 transcripts were ordered throughout the U.S. for a total cost of $83,000. The same office has budgeted $200,000 for transcripts for fiscal year 1963 in the belief that following *Coppedge* many more transcripts will be ordered. In fact, requests for transcripts have been running ahead of last year, but whether $200,000 will be expended remains to be seen.[10]

In an effort to reduce the fragmented consideration of i.f.p. appeals, and in consonance with its understanding of the requirements—if not the intentions—of *Coppedge*, the Court of Appeals for the District of Columbia Circuit has announced that it will generally order at least a partial transcript automatically for an indigent seeking leave to appeal *in forma pauperis*. The parts to be ordered are to be limited to those relating to the claims of error made by the indigent in his application for leave to appeal. The soundness of this rule appears questionable, since it is unlikely that most laymen will be able to recognize, much less articulate, the claims to be made that would merit an appellate court's attention. The attorneys appointed by the court to represent such appellants are then also burdened with a limited record of the trial they are asked to review for error and are, in effect, still thrown back to the time consuming task of personal investigation by interviews with the participants in the trial in order to fulfill their

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[10] These sums should also be compared to the amounts spent by the administrative agencies of the government for transcribing protracted hearings and which, on occasion, reach as many as 50,000 pages. It is the committee's opinion that the transcription of criminal cases merits a higher priority in the allocation of funds for transcription purposes.

responsibilities. Such a restrictive view of the requirements of *Coppedge* has already led to two divided decisions by the Court, one of which is currently pending before the Supreme Court on petition for certiorari.[11]

Suggestions that transcripts costing $100 or less be automatically granted, $200 or less be granted with the approval of the U.S. Attorney and those costing more be granted at court order are, of course, but short-hand expedients for most cases, though a blatant denial of equal protection to the defendant who has undergone a long trial.

In this connection, two additional facts should be noted. First, present law requires and finances the presence of a court reporter and the verbatim recording of all proceedings in a federal criminal trial. Thus, the question of "transcripts" for indigents is really directed only at the transcription of existing records into typed or other comparable, usable form. The principal costs of a transcript—securing a trained reporter and the actual recording of the proceedings—are already met out of the appropriated funds from which the court reporters are paid. Second, although the transcription of records is but a part of the process of preparing a transcript, it is a time-consuming one. It is so much so that the court reporters throughout the Nation have consistently failed to comply with 28 U.S.C. § 753(b) requiring them to transcribe and file *all* proceedings concerning pleas and sentencing, and the Administrative Office of the Courts has been unable to enforce this provision. Thus an expanded requirement for automatic transcription of trial records will undoubtedly entail not only the added per page cost of such transcripts, but the salaries of additional reporters and/or stenographers and typists capable of reading and typing a reporter's notes of the trial. The

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[11] *Hardy* v. *United States*, Misc. No. 1834, decided October 24, 1962, pending on cert. as No. 783 Misc. October Term 1962; *Ingram* v. *United States*, Misc. No. 1797, decided Dec. 6, 1962.

committee has no statistics from which the cost of such a program could be projected. However, it suggests as a useful area of study the cost of the administration of military justice under The Uniform Code of Military Justice. The Code requires the verbatim recording and transcription of all prosecutions resulting in sentences of felony proportions and for automatic appeal at government expense of such cases to a three member Board of Review. As the uniformed services conduct almost as many trials by general court martial each year as all the civilian federal courts combined, and the approximately 10 Boards of Review consider many more cases than the 11 federal Circuit Courts of Appeal,[12] this existing Congressionally enacted procedure merits close study and comparison.

The automatic availability of full transcripts for all persons seeking to appeal their convictions will, it is believed, have the following additional, possibly money-saving results:

1. The time of all persons who must now be consulted by appellate counsel in their search for error to present for review will no longer be taken for this purpose.

2. The time of counsel themselves—be they the presently uncompensated, court appointees or members of a future public defender staff—will be saved for more useful purposes, such as the better preparation of each case and the handling of more cases.

3. The availability of full trial transcripts and the knowledge that they have once been reviewed by an appellate court may reduce both the number of, and certainly should reduce the time consumed in considering, petitions for post-

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[12] See chart 4, and compare charts 3 and 5.

conviction relief. It is this type of "criminal" case, as frequently arising from state prisoners as from those held under federal conviction—technically considered by the courts to be a civil proceeding—that has burgeoned in recent years and control of which is urgently needed. Logically, the rules suggested for criminal appeals by this report are equally appropriate to these cases as well. As a practical matter, they probably cannot now be made applicable and perhaps as a constitutional matter they need not be.[13] However, the achievement of automatic, adequate direct review of convictions should alleviate, to a degree, the problems of sifting and deciding the mounting number of post-conviction claims by federal prisoners.

## CONCLUSIONS

In the light of the protracted delays and extensive consumption of time which the present system of handling indigents' appeals requires of bench and bar, it appears reasonable to ask for a different solution, consonant both with constitutional principles of equality before the law and the demands of economy. Since it appears that in a substantial number of cases a direct appeal *in forma pauperis* is ultimately allowed even under the present system, and since the total number of such appeals is not considerable, the most desirable solution appears to be an amendment to existing law so as to afford an appeal with automatic provision of a full transcript, in every criminal case in which a convicted defendant wishes to take a direct appeal.[14] This would be consistent with the suggestion of

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[13] But see *Smith* v. *Bennett*, 365 U.S. 708 (1961). *Cf. United States* v. *Visconti*, 261 F. 2d 215 (2d Cir. 1958).

[14] The amendments need not be extensive, involving primarily a revision of the short basic statute governing all *in forma pauperis* litigation, 28 U.S.C. § 1915, and a few ancillary statutes and rules of procedure, such as 28 U.S.C. § 753 and Rule 39(c) Fed. R. Crim. Proc.

Mr. Justice Stewart, concurring in the *Coppedge* case, that courts of appeals undertake to grant appeals *in forma pauperis* as a matter of course, in order to avoid constitutional difficulties and dissipation of time and energy in preliminary skirmishing.

The approximate cost of such a system is, however, not determinable from existing statistics. Available facts point to costs well under $500,000 per year for all federal criminal cases. It may be desirable to undertake a more detailed study with a view toward ascertaining more precise cost figures and comparing them with the present expense to the government of *in forma pauperis* appeals, making provision for the man-hours spent and to be spent by judges, government attorneys and counsel in preparing the cases and disposing of them. We feel confident that upon mature reflection of the facts, and of the human as well as monetary factors involved, the conclusion will be inescapable that the Uni ed States cannot afford any lesser system and yet adhere to the principle of equal justice under law.

Chart #1

## STATISTICS ON CRIMINAL CASES AND APPEALS IN FEDERAL COURTS

from the Annual Report of United States Attorneys, Department of Justice

| Fiscal Year | Criminal Cases Terminated | Criminal Defendants Terminated | Pleaded Guilty | Went to Trial | Found not Guilty or Dismissed | Found Guilty | Appeals Terminated | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | | For U.S. | Against U.S. | Other | Total |
| **United States:** | | | | | | | | | | |
| 1958 | 29,806 | 39,174 | 27,917 | 4,583 | 1,330 | 3,253 | 409 | 60 | 225 | 694 |
| 1959 | 30,929 | 40,805 | 28,624 | 4,361 | 1,396 | 2,965 | 462 | 68 | 252 | 782 |
| 1960 | 30,462 | 38,855 | 27,645 | 4,683 | 1,373 | 3,310 | 435 | 41 | 203 | 679 |
| 1961 | 30,309 | 38,857 | 27,554 | 4,544 | 1,355 | 3,189 | 396 | 59 | 173 | 628 |
| 1962 | 31,017 | 39,289 | 27,733 | 4,768 | 1,403 | 3,365 | 419 | 41 | 202 | 662 |
| **District of Columbia** | | | | | | | | | | |
| 1958 | 1,727 | 2,247 | 1,006 | 549 | 130 | 419 | 94 | 26 | 91 | 211 |
| 1959 | 1,624 | 2,110 | 874 | 490 | 148 | 342 | 147 | 25 | 114 | 286 |
| 1960 | 1,317 | 1,693 | 839 | 402 | 106 | 296 | 113 | 10 | 60 | 183 |
| 1961 | 1,274 | 1,617 | 765 | 455 | 82 | 373 | 84 | 17 | 32 | 133 |
| 1962 | 1,215 | 1,592 | 671 | 514 | 144 | 370 | 78 | 7 | 42 | 127 |

Chart #2

STATISTICS ON CRIMINAL TRIALS IN FEDERAL COURTS
from the Annual Report of the Director of the Administrative Office of United States Courts

| Fiscal Year | Criminal Cases Terminated | Criminal Defendants Terminated | Pleaded guilty or nolo contend. | Found not guilty or dismissed | Found guilty after trial | Length of Trials: under 1 day | 1 day | 2 days | 3 days | over 3 days |
|---|---|---|---|---|---|---|---|---|---|---|
| United States: 86 districts, not including District of Columbia (prior to 1962), Alaska (prior to 1961), Canal Zone, Guam and Virgin Islands. | | | | | | United States: All districts | | | | |
| 1958 | 28,634 | 34,165 | 24,256 | 3,661 | 2,552 | 991 | 1,487 | 719 | 290 | 343 |
| 1959 | 28,424 | 34,411 | 24 793 | 3,696 | 2,240 | 622 | 1,386 | 684 | 272 | 383 |
| 1960 | 29,864 | 36,349 | 24,245 | 03 784 | 2,483 | 671 | 1,393 | 722 | 320 | 409 |
| 1961 | 29,881 | 36,288 | 24 830 | 4,046 | 3,795 | 1099 | , 819 | 757 | 392 | 411 |
| 1962 (preliminary report) | --- | 36,195 | not available | ----- | ----- | ---- | ----- | --- | ---- | --- |
| District of Columbia: | | | | | | | | | | |
| 1958 | 1,325 | 1,714 | | | | | | | | |
| 1959 | 1,313 | 1,705 | | | | | | | | |
| 1960 | 1,085 | 1,401 | | | | | | | | |
| 1961 | 1,098 | 1,377 | | | | | | | | |
| 1962 | ---- | 1,313 | | | | | | | | |

Chart #3

## STATISTICS ON CRIMINAL APPEALS IN FEDERAL COURTS
from the Annual report of the Director of the Administrative Office of United States Courts

| Fiscal Year | Appeals Terminated | Disposed of without hearing or submission | Affirmed | Dismissed | Reversed | Other | % Reversed | Petitions for cert. filed | Cert. granted |
|---|---|---|---|---|---|---|---|---|---|
| **United States: All Circuit Courts of Appeals** | | | | | | | | | |
| 1958 | 596 | 148 | 339 | 14 | 93 | 2 | 20.8 | 214 | 29 |
| 1959 | 633 | 194 | 342 | 9 | 86 | 2 | 19.6 | 232 | 23 |
| 1960 | 580 | 139 | 348 | 14 | 78 | 1 | 17.7 | 253 | 36 |
| 1961 | 628 | 180 | 340 | 7 | 96 | 5 | 21.4 | 250 | 26 |
| 1962 | 622 | 130 | 345 | 8 | 94 | 3 | 20.9 | 245 | 19 |
| **District of Columbia Circuit** | | | | | | | | | |
| 1958 | 104 | 22 | 66 | 2 | 13 | 1 | 15.9 | 59 | 11 |
| 1959 | 132 | 40 | 70 | 1 | 19 | 2 | 20.7 | 75 | 3 |
| 1960 | 120 | 30 | 63 | 4 | 22 | 1 | 24.4 | 70 | 5 |
| 1961 | 91 | 20 | 57 | 2 | 10 | 2 | 24.0 | 72 | 14 |
| 1962 | 108 | 22 | 58 | 2 | 15 | 2 | 19.5 | 71 | 7 |

Chart #4

## STATISTICS ON THE ADMINISTRATION OF MILITARY JUSTICE

**From the Annual Reports of the United States Court of Military Appeals, the Judge Advocate General of the Armed Forces and the General Counsel of the Treasury Department**

| *Calendar Year* | *General Courts Martial Convened* | *Cases Considered by Boards of Review* [1] | *% Cases Heard by Boards of Review with Appointed Counsel for the Appellants* [2] |
|---|---|---|---|
| 1958: | | | |
| Army | * | 2,447 | 61.5 |
| Navy | * | 4,615 | 54 |
| Air Force | 768 | 2,331 | 53 |
| Coast Guard | 10 | 51 | * |
| Total | * | 9,444 | |
| 1959: | | | |
| Army | * | 1,853 | 75.2 |
| Navy | 1,064 | 4,217 | * |
| Air Force | 684 | 1,888 | 55 |
| Coast Guard | 3 | 53 | 48 |
| Total | * | 8,111 | |
| 1960: | | | |
| Army | * | 1,604 | 75.2 |
| Navy | 805 | 4,011 | * |
| Air Force | 538 | 1,518 | 57 |
| Coast Guard | 6 | 26 | * |
| Total | * | 7,159 | * |
| 1961: | | | |
| Army | 1,899 | 1,432 | 76 |
| Navy | 500 | 3,376 | 54 |
| Air Force | 387 | 1,195 | 60 |
| Coast Guard | 4 | 24 | * |
| Total | 2,790 | 6,027 | |

* Figures not reported.

[1] Cases considered by Boards of Review exceed numbers of general courts martial convened, even though latter figure includes trials at which the defendant was acquitted, since the Boards must also review the results of special courts martial in which a punitive discharge is awarded the accused.

[2] This percentage would roughly correspond to the number of cases heard and considered on the basis of full briefs and oral argument. The remainder, in which counsel was not requested, would be approximately the number of cases disposed of without hearing or submission, corresponding to column 3, chart 3.

Chart #5

## A SURVEY OF IN FORMA PAUPERIS APPEALS IN CRIMINAL CASES IN THE FEDERAL COURTS IN FISCAL YEAR 1960

(This survey was conducted through mailed questionnaires addressed to the Chief Judge of each of the United States Courts of Appeals by Bennett Boskey, Esq. of Washington, D.C. in connection with the preparation of his article "The Right to Counsel in Appellate Proceedings," 45 Minn. L. Rev. 783, (1961).)

| Circuit | Direct Appeals | | | Appeals in Collateral Attacks by Federal Prisoners | | | Total | | |
|---|---|---|---|---|---|---|---|---|---|
| | Granted by D.C. | Granted by C.A. | Denied by C.A. | Granted by D.C. | Granted by C.A. | Denied by C.A. | Granted by D.C. | Granted by C.A. | Denied by C.A. |
| First | * | 5 | 4 | * | 2 | 3 | * | 7 | 7 |
| Second | * | * | * | * | * | * | * | 9 | 11 |
| Third | a | 9[a] | 0 | a | 5[a] | 5 | 8 | 6 | 5 |
| Fourth | * | 9 | 2 | * | 20 | 14 | * | 29 | 16 |
| Fifth | 17 | 5 | 0 | 16 | 7 | 22 | 33 | 12 | 22 |
| Sixth | * | 11 | 0 | * | 25 | 17 | * | 36 | 17 |
| Seventh | * | * | * | * | * | * | * | * | * |
| Eighth | * | 4 | * | * | * | * | b | 63[b] | b |
| Ninth | b | 28[b] | b | b | 96[b] | b | b | 120[b] | b |
| Tenth | * | * | * | * | * | * | * | 37 | 14 |
| D. C. | * | 13 | * | * | 9 | * | 60 | 24 | 136 |

a. Granted by either District Court or Court of Appeals.

b. Total number of cases considered without indication of disposition.

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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1963**

## No. 112

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ZEBEDEE HARDY,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

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## BRIEF FOR PETITIONER

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*(Appointed by the Court of Appeals)*

# INDEX


| | Page |
|---|---|
| **PETITIONER'S BRIEF** | |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statutes Involved | 1 |
| Question Presented | 2 |
| Statement | 2 |
| Summary of Argument | 4 |
| Argument | 5 |
| Conclusion | 18 |
| Appendix | 19 |


## TABLE OF AUTHORITIES CITED

CASES:


| | |
|---|---|
| *Avery* v. *Alabama*, 308 U.S. 444 | 15 |
| *Coppedge* v. *United States*, 369 U.S. 438 | 4, 5, 7, 8, 9, 12, 13, 14, 15, 16 |
| *Douglas* v. *California*, 372 U.S. 353 | 5, 7, 8, 10, 15 |
| *Draper* v. *Washington*, 372 U.S. 487 | 5, 7, 8, 9, 13, 14, 17 |
| *Ellis* v. *United States*, 356 U.S. 674 | 5, 8, 10, 16 |
| *Griffin* v. *Illinois*, 351 U.S. 12 | 7, 8, 17 |
| *Hurd* v. *Hodge*, 334 U.S. 24 | 7 |
| *Ingram* v. *United States*, —— U.S. App. D.C. ——, 315 F.2d 29 | 4, 6, 10, 13, 14, 17 |
| *Johnson* v. *United States*, 352 U.S. 565 | 17 |
| *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 | 11 |
| *Stansbury* v. *United States*, 219 F.2d 165 | 6 |
| *Stephens* v. *United States*, 289 F.2d 308 | 5 |
| *Surratt* v. *United States*, 104 U.S. App. D.C. 380, 262 F.2d 691 | 6 |
| *Surratt* v. *United States*, 106 U.S. App. D.C. 49, 269 F.2d 240 | 6 |

Page

*United States* v. *Germany*, 32 F.R.D. 421 (N.D. Ala., 1963) ..... 11
*Whitt* v. *United States*, 104 U.S. App. D.C. 1, 259 F.2d 158 ..... 14

STATUTES AND RULES CITED:

U.S. Constitution, Sixth Amendment ..... 8
21 U.S.C. § 174 ..... 2
26 U.S.C. § 4704(a) ..... 2
28 U.S.C. 753(b) (Court Reporter Act, 62 Stat. 922) ..... 5, 17
28 U.S.C. § 1254(1) ..... 1
28 U.S.C. § 1915 ..... 16
28 U.S.C. § 2101(e) ..... 1
Rules of Court of Appeals of the District of Columbia Circuit, Rule 33(b)(2)(i) ..... 14
Federal Rules of Criminal Procedure, Rule 52(b) ..... 6
Rules of the Supreme Court of Illinois, Rule 65-1, Ill. Stat. Ann. (Smith-Hurd, 1956), c. 110, § 101.65-1 ..... 17

MISCELLANEOUS CITED:

Boskey, "The Right to Counsel in Appellate Proceedings," 45 Minn. L. Rev. 783, 793 (1961) ..... 9
Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963) ..... 9, 10, 12

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1963**

## No. 112

ZEBEDEE HARDY,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

## BRIEF FOR PETITIONER

### Opinions Below

The per curiam orders entered by the court below (R. 11, 15, 22) are not officially reported.

### Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(e). On April 29, 1963, this Court granted petitioner's motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari (R. 24). 373 U.S. 902.

### Statutes Involved

Relevant provisions of the statutes and Rules are set out in the Appendix.

## Question Presented

Whether, in the federal system, equal opportunity to appeal requires that counsel appointed to represent an indigent faced with a district court finding of frivolity be furnished promptly a complete stenographic transcript of the trial proceedings.

## Statement

On February 16, 1962, pursuant to jury verdict returned on January 15, 1962, petitioner was adjudged guilty as charged of narcotics violations under 26 U.S.C. § 4704(a) and 21 U.S.C. § 174, and sentenced by Judge Alexander Holtzoff to imprisonment "on Count One of this indictment for a term of not less than twenty months and not more than five years, and on Count Two for a term of five years, the sentences to run concurrently." *United States* v. *Zebedee Hardy*, Crim. No. 822-61, in the United States District Court for the District of Columbia. On February 19, 1962, Judge Holtzoff denied petitioner's application for leave to proceed without prepayment of costs, certifying that "the appeal is frivolous and not taken in good faith."[1]

On March 16, 1962, petitioner filed in the court below a petition for leave to appeal *in forma pauperis* and affidavit in support thereof (R. 1-2). On March 19, 1962, Judge, then Chief Judge, Miller appointed the undersigned counsel to represent petitioner and allowed thirty days to

[1] The office of the Criminal Clerk, United States District Court, has declined, without payment of costs, to supply to counsel appointed by the Court of Appeals a copy of the indictment, of the transcript of the sentencing portion of the proceeding which is in the District Court file, the judgment and commitment, and the affidavit in support of petitioner's application, with Judge Holtzoff's ruling thereon.

file a memorandum in support of the petition (R. 3). On April 17, 1962, petitioner, by counsel, filed a motion for an order directing the furnishing of a stenographic transcript at the expense of the United States, and for an extension of time (R. 4). On April 24, 1962, the United States Attorney filed an opposition predicated on the absence of "specific factual allegations" of error and the fact that counsel had not consulted "either the trial judge or the court-reporter" (R. 7). On May 11, 1962, the court entered a per curiam order (R. 11) directing:

> "that petitioner be, and he is hereby, allowed to proceed in forma pauperis to the extent of having the stenographic transcript of the testimony and evidence presented by the government prepared at the expense of the United States and that the time for filing a memorandum in support of the petition for leave to prosecute an appeal without prepayment of costs be, and it is hereby, extended until 30 days after preparation of the stenographic transcript. *Coppedge* v. *United States,* No. 157, October Term, 1961, *Supreme Court of the United States,* April 30, 1962."

On May 21, 1962, petitioner filed a motion for clarification or rehearing (R. 12-14). By per curium order that motion was denied (R. 15).

On September 20, 1962, petitioner filed a motion for an order directing furnishing of stenographic transcript of balance of district court proceedings or, in the alternative, for entry of an order denying leave to appeal (R. 18). On September 26, 1962, the United States Attorney advised the Court that the United States did not intend to submit an opposition (R. 21). On October 24, 1962, the court, Judges Miller and Bastian, entered a per curiam order (R. 22) denying "petitioner's motion for stenographic tran-

script of the balance of the proceedings in the District Court." The order noted that Judge Fahy "would grant the motion."

After the petition for leave to proceed in this Court was filed on November 30, 1962, the court below issued its opinion in *Ingram* v. *United States*, —— U.S. App. D.C. ——, 315 F.2d 29 (1962). It explained that to "implement" *Coppedge* it had adopted "a new procedure" under which counsel in *forma pauperis* cases are furnished upon appointment only that "portion of the transcript of the proceedings which relates to the conclusory allegations" formulated by the indigent defendant *pro se*. 315 F.2d, at 30-31. Thereafter, additional portions of the transcript will be furnished only if counsel "can in good conscience advance other claims of error requiring additional portions of the transcript," or demonstrate "complete inadequacy of the sources of information" by "detailed recitation of the results" of comprehensive investigation. *Id.*, at 31. These conditions are imposed because "the *Coppedge* case does not hold that a transcript must be furnished to enable a petitioner to search for unsuspected errors." *Id.*, at 32.

In the light of this opinion, on December 17, 1962, petitioner filed a motion for leave to supplement the petition.

## Summary of Argument

An indigent convict in the federal system, faced with a district court finding of frivolity, is entitled to the benefit of a complete stenographic transcript as of right because a transcript is available as of course to any defendant with money, and denial deprives the indigent of the advantage of the "plain error" rule. To condition and restrict the size of transcript available to an indigent upon claim of error, where no such condition or restriction con-

fronts a defendant with money, denies indigents (1) the right to appeal, (2) the right not to be discriminated against for poverty and (3) the right to effective assistance of counsel. *Douglas* v. *California*, 372 U.S. 353 (1963).

There is no substitute for a complete stenographic transcript in the search for lurking error. Appointed counsel and the court must both make that search before an indigent's appeal can constitutionally be dismissed for frivolity. *Ellis* v. *United States*, 356 U.S. 674. To deny or withhold the necessary transcript is invidiously to burden and hamper indigents' counsel and discriminatorily to delay and thwart indigents' appeals.

## ARGUMENT

### An Indigent Defendant, Faced With a District Court Finding of Frivolity, Is Entitled to a Complete Stenographic Transcript as a Matter of Right.

In contemporary focus, the issue is whether the transcript practice of the court below deprives indigents of the right to have their appeals tested for frivolity "on the same basis" (*Draper* v. *Washington*, 372 U.S. 487, 499 (1963)), as non-indigents. The court below sidestepped and ignored the equality issue. It conditioned and limited availability of a stenographic transcript in indigents' cases to claims of error, whereas no such barrier or limitation exists in non-indigents' cases.

Under the Court Reporter Act, 62 Stat. 922, 28 U.S.C. 753(b), a complete stenographic transcript is available to any defendant in the federal courts who can pay the price.[1] *Stephens* v. *United States*, 289 F.2d 308 (5 Cir., 1961).

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[1] "Stenographic transcripts in the federal courts cost $0.56 per page for the first copy and $0.30 per page for additional copies." *Coppedge* v. *United States*, 369 U.S. 438, 443, n. 6 (1962).

Congress made provision for stenographic transcripts in all cases "to prevent disputes and questions of veracity all too common under the old system". *Stansbury* v. *United States*, 219 F.2d 165, 169, n. 6 (5 Cir., 1955). Consequently, a stenographic transcript is potentially available in all cases where it is charged that an appeal is frivolous.

By virtue of Rule 52(b) of the Federal Rules of Criminal Procedure, frivolity is negated by the existence of "plain error", unnoticed below and unclaimed. Compare *Surratt* v. *United States*, 104 U.S. App. D.C. 380, 262 F.2d 691, 692 (dissenting opinion) with *Surratt* v. *United States*, 106 U.S. App. D.C. 49, 269 F.2d 240 (1959), reversing the judgment of conviction. Any defendant with money can guard against oversight of "plain error" in the Court of Appeals by purchasing a complete transcript. The policy of the court below deprives indigent defendants of that safeguard. In the case of indigents, only those portions of the transcript can be searched for unnoticed error which were deemed by the Court of Appeals to relate to errors explicitly claimed.

In justifying this on the theory that it could require counsel for indigents "to appeal upon a bystander's bill of exceptions, or upon an agreed statement of facts" (*Ingram*, 315 F.2d, at 32), the court below ignored that such a requirement would be rank discrimination against indigents. Defendants with money are not required to defend a charge of frivolity on less than a complete stenographic transcript. To require indigents to do so is to deprive them of (1) the right to appeal, (2) the right not to be invidiously discriminated against for poverty and (3) the right to effective assistance of counsel.

It should go without saying that indigents are as much entitled to the protection of the "plain error" rule as defendants with money. Equal protection considerations,

which permeate our constitutional philosophy (*Hurd* v. *Hodge*, 334 U.S. 24, 34-36 (1948)), require the United States "to provide the indigent as adequate and effective an appellate review as that given appellants with funds." *Draper* case, 372 U.S., at 496; *Coppedge* v. *United States*, 369 U.S. 438, 447 (1962); *Douglas* v. *California*, 372 U.S. 353, 355-358 (1963). "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." *Griffin* v. *Illinois*, 351 U.S. 12, 19 (1956).

> "Particularly since litigants *in forma pauperis* may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition, is appellate review of their cases any less searching than that accorded paid appeals inappropriate." *Coppedge*, 369 U.S., at 450.

That indigents, unlike defendants with money, are required to make application for leave to appeal, cannot justify discriminatory restriction of their power to defend against a charge of frivolity. *Coppedge* holds that on the frivolity issue the Government must carry the same "burdens of proof and persuasion" in indigent as in non-indigent cases:

> "Since our statutes and rules make an appeal in a criminal case a matter of right, the burden of showing that that right has been abused through the prosecution of frivolous litigation should, at all times, be on the party making the suggestion of frivolity. It is not the burden of the petitioner to show that his appeal has merit, in the sense that he is bound, or even likely, to prevail ultimately. He is to be heard, as is any appellant in a criminal case, if he makes a rational argument on the law or facts. It is the burden of the Government, in opposing an attempted criminal appeal *in forma pau-*

> *peris*, to show that the appeal is lacking in merit, indeed, that it is so lacking in merit that the court would dismiss the case on motion of the Government, had the case been docketed and a record been filed by an appellant able to afford the expense of complying with those requirements." (369 U.S., at 447-448.)

Denial to indigents of a complete transcript deprives them of the benefit of the plain error rule, "disabling them from bringing to the notice of [the] appellate tribunal errors of the trial court" (*Griffin* v. *Illinois*, 351 U.S. 12, 23), which might defeat the claim of frivolity. "The indigent, where the * * * errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal." *Douglas* v. *California*, 372 U.S. 353, 358 (1963). This is the "invidious discrimination" *Griffin* and *Coppedge*, 369 U.S., at 445, note 13, forbid.

It follows that in the federal system an indigent defendant confronted with the "predictable finding of frivolity" (*Draper* case, *supra*, 372 U.S. at 498), must be provided with a complete stenographic transcript at the time counsel is appointed. Not only is this necessary to assure that the right of review on the merits will not be denied in cases of substance, and to avoid invidious discrimination for poverty, it is essential to effectuate the Sixth Amendment's guarantee of effective assistance of counsel. *Ellis* v. *United States*, 356 U.S. 674-675 (1958), holds that an applicant for leave to appeal *in forma pauperis* is entitled to "adequate representation by counsel", who, in "the role of advocate", must make a "conscientious", diligent, investigation of "the possible grounds of appeal", and that leave to appeal should not be denied unless counsel finds no non-frivolous issue and the court "agrees with counsel's evaluation of the case." The indigent is entitled to appeal as of right if, with the assistance of counsel, he "presents any issue for the court's

consideration not clearly frivolous." *Coppedge* case, *supra*, 369 U.S., at 446. Without a complete transcript, adequate investigation of one possible ground of appeal—unnoticed error—is not only unfeasible but virtually impossible.

Logic and experience alike attest that there can be no substitute for a complete stenographic transcript in unearthing lurking error. If the error was not noticed by either trial counsel or judge, it is unlikely if not impossible that inquiry of them will uncover it. And hearing a reporter read his notes is no substitute for leafing and pondering a stenographic transcript. "Frequently, issues cannot even be seen—let alone assessed—without reading an accurate transcript." Boskey, *"The Right to Counsel in Appellate Proceedings,"* 45 Minn. L. Rev. 783, 793 (1961). Denial of a complete transcript necessarily results in "depriving defendant of the possibility of reversal on the ground that the record contains 'plain error' of which the defendant was unaware and of which he might have had the benefit had he possessed means adequate to purchase a complete transcript." *Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice* (1963), p. 101.

Because of the plain error rule, paid appellate counsel in a federal case would never forego perusal of a complete stenographic transcript. "It defies common sense to think that a moneyed defendant faced with long-term imprisonment and advised by counsel [of the plain error rule] will [risk dismissal for frivolity or jeopardize his chances for reversal on] appeal merely to save the cost of a transcript. The [Court of Appeals'] procedure for indigents, therefore, cannot be justified as an attempt to equalize the incidence of appeal as between indigents and non-indigents." *Draper* case, *supra*, 372 U.S. at 495, n. 4. No solvent defendant would direct his lawyer to embark upon an investigation

through sources outside the transcript of "the circumstances giving rise to the indictment, the theory of the prosecution, the defenses raised by petitioner, the witnesses presented by each party, and the pertinency of their testimony, the objections made by defense counsel * * *" (*Ingram* case, 315 F.2d at 32), in order to save money, for the cost of a transcript would be trifling in comparison with the cost of investigation. Moreover, no self-respecting lawyer would, for a paying client, undertake such useless, distasteful, make-work. A solvent defendant would supply his counsel with as much of the transcript as counsel desired to examine or he would not be represented by counsel.

Nothing in the "good faith" requirement warrants denial to indigents of as complete a transcript as defendants with money can furnish their counsel. Lawyers for solvent defendants are not expected to take frivolous appeals for a fee, and conscientious lawyers do not do so. Without studying a complete transcript retained appellate counsel is never in a position to know or to advise his client that appeal would be futile. Appointed appellate counsel for an indigent is in no better position to so advise the Court. *Ellis* forbids appellate counsel to advise the Court that appeal would be futile unless he has examined a complete transcript. A paying defendant can obtain a complete transcript for his lawyer without showing inquiry or investigation of any kind. It is unconstitutional and invidious to exact such a showing from an indigent one. *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

Moreover, as the Attorney General's Committee points out (*Report*, p. 102):

> "The efforts of assigned counsel to search out, in the absence of an adequate transcript of the trial, a sufficient basis for granting leave to appeal is wasteful not only of the lawyer's time, but that of the officials

> whom he must contact and interview for this purpose. * * * It is not far from the truth to say that the federal system seeks to avoid the expenses of supplying transcripts to all financially disadvantaged defendants desiring to appeal by shifting the burdens to lawyers required to serve without compensation or reimbursement of expenses. * * * "

It is no answer to say that this is necessary to avoid saddling a heavy financial burden on Government. Cost of a transcript to the Government must inevitably be less than the cost in time of handling indigents' cases, even with the aid of a transcript, is to appointed counsel. If the imperative of justice for indigents requires courts to burden appointed counsel with the duty of diligently studying a transcript, it must also require them to impose upon the Government the cost of supplying the transcript to study. Cf. *United States* v. *Germany*, 32 F.R.D. 421 (N.D. Ala., 1963).

Of course, requiring the Government to supply a transcript to every indigent confronted with a claim of frivolity will put the Government to expense without any assurance that substance will be found. But that is unavoidable, for nothing short of study of a complete transcript will disclose whether unnoticed plain error was committed or not. In this respect furnishing a complete transcript before deciding that an indigent has no right to appeal is like having a trial before rendering judgment. "Lawsuits often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51-52 (1938).

The choice lies between imposing on Government the cost of furnishing a complete stenographic transcript in all cases and denying leave to appeal although plain error may

exist. We think there is really no alternative: governmental economy cannot be weighed in the same judicial scale with "equal treatment for every litigant before the bar." *Coppedge*, 369 U.S., at 447.

The court below does not articulate the premise which leads it to deny indigents the same opportunity to "search for error" as defendants with money have. If the premise is that the chance of unearthing plain error is so slight that it does not warrant the expense to the Government, the short answer is that the imperative of justice will not permit even one conviction to go unreviewed which would be reviewed if the defendant had money.

If the premise is that the prosecution should not be asked to finance adversaries' efforts to upset convictions, it proves too much, for on that premise the Government should not be required to pay for any portion of a transcript. More broadly, the answer is that such a premise overlooks the overriding interest our Government must have in the fair administration of justice. *Coppedge* case, 369 U.S., at 448-449. As recently stated by the Attorney General's Committee (*Report*, pp. 10-11):

> "The essence of the adversary system is challenge. The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process. The proper performance of the defense function is thus as vital to the health of the system as the performance of the prosecuting and adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges, it constitutes a threat to the viability of the adversary system. • • • Persons suffering such disabilities are incapable of providing the challenges that are indispensable to satis-

> factory operation of the system. The loss to the interests of accused individuals, occasioned by these failures, are great and apparent. • • • Beyond these considerations, however, is the fact that the conditions produced by the financial incapacity of the accused are detrimental to the proper functioning of the system of justice and that the loss in vitality of the adversary system, thereby occasioned, significantly endangers the basic interests of a free community."

If the premise is that the finding of frivolity by the trial judge is entitled to weight, why should the presumption vanish before a mere "vague and conclusory" claim of error? *Ingram* case, 315 F.2d, at 31. If an indigent is entitled to portions of a transcript which may produce substantiation of a "vague" claim, why is he not equally entitled to other portions which may disclose reversible error? Since search for either substantiation or unnoticed error may produce an "issue for the Court's consideration not clearly frivolous", one quest can no more evidence "bad faith" than the other. *Coppedge* case, *supra*, 369 U.S., at 445, 446. Surely, "the conclusion of the trial judge that an indigent's appeal is frivolous is • • • inadequate substitute for the [opportunity to unearth error] available to non-indigents • • • ." *Draper* case, *supra*, 372 U.S., at 499. If "full appellate review" (*ibid.*) is not to be aborted, the certificate of the trial judge can be given weight only on the question of the indigent's good faith in pleading poverty. If the plea of poverty is made in good faith, Government must afford the indigent the same opportunity as a non-indigent to "present any issue for the [appellate] court's consideration". *Coppedge* case, 369 U.S., at 446.

The court below doles out transcript with an improper measure because it misconceives the function to be served.

It still adheres to the view that an indigent is entitled to a transcript only to "make manifest [a] claim of error". *Ingram case*, 315 F.2d, at 30; *Whitt* v. *United States*, 104 U.S. App. D.C. 1, 5, 259 F.2d 158, 161 (1958), and Rule 33(b)(2)(i) of the Rules of the court below, Appendix, *infra*. It relies on the passage from *Coppedge* which speaks of cases where "the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application." 369 U.S., at 446.

But the evident purpose of that passage is to distinguish between petitions which on their face show "that the applicant will present issues for review not clearly frivolous" and all other cases. In the former, the reviewing court must proceed immediately "to consideration of the appeal on the merits." In the latter, the court may screen for frivolity, but not until it has provided "the would be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error." The showing can consist of presentation of "any issue * * * not clearly frivolous", 369 U.S. 446; cf., *Draper* case, 372 U.S. at 498-499. "Any issue" does not mean "any issue presented in the petition." The point of providing *both* counsel *and* an adequate record is to empower the indigent "to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error," not merely that his own "conclusory allegations" have substance. Want of substantial allegations could not possibly establish lack of good faith, for leave to appeal must be allowed if unalleged error exists. The size of the transcript which must be made available to enable indigent's counsel to establish "good faith", therefore, cannot be measured by the indigent's allegations. Furnishing a tran-

script bearing only on issues raised by the unqualified defendant leaves him as insufficiently protected as refusal to appoint counsel or to provide any transcript at all.

To attach restrictive significance to the indigent's formulation of claims and issues is to make a mockery of *Coppedge's* purpose—"equal treatment for every litigant before the bar". 369 U.S., at 447. An indigent convict who is not a lawyer is no more qualified to frame issues on appeal than he is to determine whether there is substance to claims of error he may make. It is absurd to expect him to discover reversible error overlooked by court and counsel at his trial. If he could do these things, there would be no need to appoint counsel on his application for leave to appeal. But *Coppedge* requires that counsel be appointed on the application to assure that the indigent is not prejudiced by lack of professional assistance in challenging the District Court's finding. That objective is defeated by tying counsel to the indigent's *pro se* claims. Cf. *Douglas* v. *California*, 372 U.S., at 358. Right to counsel is no more satisfied by a bobtailed appointment than by a "formal" one. *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940). If "equal treatment for every litigant before the bar" demands that courts supply indigent defendants with counsel, it must also demand that courts accord their counsel the same opportunity paid counsel have to search and ponder the entire stenographic transcript for non-frivolous grounds of appeal, unrestricted by their client's untutored claims of error.

To hold otherwise is to flout the *Coppedge* holding that good faith in this context is not confined to "persons who, in good conscience, could insist on their innocence". 369 U.S., at 445. The request of an indigent's attorney for a transcript to determine whether the record holds "any issue not frivolous" not only cannot "genuinely be charac-

terized" as "bad faith" (*id.*); it is absolute proof of "good faith".

Nothing in the language of the affidavit requirement (28 U.S.C. § 1915) suggests that an indigent's claims or statements can control appealability or the scope of review on the merits. The affiant is required to state no more than the "nature of the action, defense or appeal and affiant's belief that he is entitled to redress." There is no requirement of specification of errors or issues to be urged. Mere identification of the conviction sought to be appealed and a statement that affiant believes himself entitled to reversal suffices. On such a statement, the indigent is entitled to appeal unless he cannot present a non-frivolous issue. To require greater specificity in the affidavit or to give weight to surplusage, is to go "beyond the corners of 28 U.S.C. § 1915" (*Coppedge* case, 369 U.S., at 446), in the wrong direction.

For the same reason § 1915 cannot be relied on to justify requiring indigents' counsel to advance "other claims of error" before obtaining "additional portions of the transcript." The task of the indigent's lawyer, as *Ellis* holds, is to reach a conclusion whether any substantial question can be presented after conscientious investigation of all possible grounds for appeal. That job he cannot do without examining a complete transcript. Nothing in § 1915 authorizes a court to impose on indigents' counsel a burden of extra-transcript investigation and interim reporting or to supervise its performance. Cf. *Coppedge*, 369 U.S., at 457 (concurring opinion). Imposition simply discourages acceptance of *in forma pauperis* assignments and perpetuates delay and discrimination in the processing of indigents' appeals. *Id.*, at 458. Ironically, in the end, the need for a complete transcript is not avoided for, under *Ellis*, the Court of Appeals could not properly deny leave to appeal without satisfying itself that no reversible error

exists, and this it could not possibly do without a complete transcript.

Of course, an indigent is entitled to a complete stenographic transcript only in those systems in which such a transcript is necessary "to provide the indigent as adequate and as effective an appellate review as that given appellants with funds". *Draper* case, *supra*, 372 U.S., at 496. In States where error unnoticed below or unclaimed is not noticeable on appeal, portions of the proceedings wholly unrelated to contentions properly preserved need not be transcribed. And in States which do not have the equivalent of a Court Reporter Act, official transcripts need not be provided for indigents which would have been unavailable to a defendant able and willing to pay. But, *cf.* Rule 65-1, Rules of the Supreme Court of Illinois, Ill. Stat. Ann. (*Smith-Hurd*, 1956), c. 110, § 101.65-1. The obligation of the State is only to put the indigent in as good a position to appeal as the defendant with counsel and money. This, we take it, is all that the quotation from *Griffin* relied on below (*Ingram*, 315 F.2d, at 32), means.

*Johnson* v. *United States*, 352 U.S. 565, 566 (1957), assumed that the burden rested on the indigent to show that his "grounds for seeking an appeal * * * are not frivolous", rather than on the Government to show that there is no substantial ground. The restrictive language of *Johnson* therefore fell with rejection of its premise in *Coppedge*, pp. 7-8, *supra*.

## Conclusion

For the foregoing reasons it is respectfully submitted that the Court below should be directed to grant petitioner appropriate relief.

Respectfully submitted,

MOZART G. RATNER
*Counsel for Petitioner*
*(Appointed by the Court of Appeals)*

## APPENDIX

### Statutory Provisions and Rules Involved

28 U. S. C. § 1915. Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

* * * * *

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious. * * * As amended October 31, 1951, c. 655, § 51 (b, c), 65 Stat. 727; Sept. 21, 1959, Pub. L. 86-320, 73 Stat. 590.

The Court Reporter Act, 62 Stat. 922, 28 U. S. C. § 753(b):

One of the reporters appointed for each such court shall attend at each session of the court and at every other proceeding designated by rule or order of court or by one of the judges, and shall record verbatim by shorthand or by mechanical means: (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall specifically agree to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court or as may be requested by any party to the proceeding.

*Federal Rules of Criminal Procedure*

Rule 52(b). Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

*Rules of the United States Court of Appeals for the District of Columbia Circuit*

Rule 33(b)(2) In Appeals in Forma Pauperis.

(i) Where Petitioner is Not Represented by Counsel.

The petition of an indigent not represented by counsel, seeking leave to proceed on appeal in forma pauperis, shall be considered by the court to which it is addressed as also encompassing a request for the preparation of a transcript of the evidence or proceedings at the expense of the United States. If the court allows the appeal in forma pauperis, the court shall then also determine at the same time whether, and to what extent, a transcript will be necessary for the proper determination of the appeal. If the court determines that a transcript will be required, then in the same order authorizing the appeal in forma pauperis the court will also direct that an appropriate transcript be prepared and furnished to the appellant at the expense of the United States.

# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 2 |
| Question presented | 2 |
| Statute involved | 3 |
| Statement | 3 |
| Summary of Argument | 9 |
| Argument: | |
| I. An indigent defendant whose appeal has been certified by the trial court not to be taken in good faith, and who makes no claim of error, is not entitled to a complete transcript of his trial to enable his counsel to search it for unnoticed error | 11 |
| A. Petitioner's contention is irreconcilable with the repeated statement by this Court that an indigent defendant has no automatic right to a complete transcript of his trial at public expense merely because a defendant with funds can purchase such a transcript | 13 |
| B. The principle of equal justice for all litigants neither requires nor justifies the rule contended for by petitioner | 17 |
| II. This interlocutory proceeding should be remanded to the court of appeals for further proceedings in accordance with that court's subsequent decision in *Ingram* v. *United States* | 21 |
| Conclusion | 28 |
| Appendix | 29 |

Page

## CITATIONS

Cases:

*Coppedge* v. *United States*, 369 U.S. 438.. 7, 13, 14, 15, 17, 20, 22, 23
*Douglas* v. *California*, 372 U.S. 353..... 10, 18
*Draper* v. *Washington*, 372 U.S. 487..... 14, 15
*Eskridge* v. *Washington Prison Board*, 357 U.S. 214..... 14
*Farley* v. *United States*, 354 U.S. 521.... 14
*Griffin* v. *Illinois*, 351 U.S. 12.....10, 14, 15, 19
*Ingram* v. *United States*, 315 F. 2d 29.... 9, 11, 16, 21, 22, 25, 26, 27
*Johnson* v. *United States*, 352 U.S. 565.... 13, 14
*McNabb* v. *United States*, 318 U.S. 332.... 20
*Miller* v. *United States*, 317 U.S. 192.... 14
*Palko* v. *Connecticut*, 302 U.S. 319..... 20
*Scott* v. *United States*, 374 U.S. 502..... 27
*Surratt* v. *United States*, 262 F. 2d 691.... 13

Constitution of the United States:

Fourteenth Amendment..... 9, 13

Statutes and Rules:

21 U.S.C. 174..... 4
26 U.S.C. 4704(a)..... 4
28 U.S.C. 1254(1)..... 8
28 U.S.C. 1915(a).....3, 4, 12
28 U.S.C. 2101(e)..... 8
Rule 20, Rules of the Supreme Court..... 8
Rule 33(b)(2)(i), Rules of the Court of Appeals of the District of Columbia Circuit..... 17

Miscellaneous:

Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963).... 27

# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 112

ZEBEDEE HARDY, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

Neither the district court nor the court of appeals rendered an opinion, and the court of appeals has entered no final order. The district court's order denying petitioner leave to appeal *in forma pauperis* and certifying the appeal to be frivolous and not taken in good faith appears in the Appendix, *infra*, p. 33. The court of appeals' interlocutory orders (R. 11, 22) are not reported.

## JURISDICTION

The court of appeals' order allowing petitioner to appeal *in forma pauperis* to the extent of requiring that he be furnished a transcript of the government's evidence at the expense of the United States was entered on May 11, 1962 (R. 11). On September 20, 1962, petitioner requested the court to direct that he be furnished a free transcript of the balance of the trial proceedings, or, in the alternative, that he be denied leave to appeal *in forma pauperis* (R. 18-20). On October 24, 1962, the court denied petitioner's request for a full transcript, but took no action with respect to the alternative motion that leave to appeal as an indigent be denied (R. 22). The petition for a writ of certiorari, seeking review of the May 11 and October 24 interlocutory orders, was filed on November 30, 1962, and was granted on April 29, 1963 (R. 24; 373 U.S. 902). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101(e).

## QUESTION PRESENTED

Whether a defendant who has been denied leave to appeal from a conviction *in forma pauperis* by the trial court, the court certifying the appeal to be frivolous and not taken in good faith, and whose counsel, appointed by the court of appeals to represent him on a motion to that court for leave so to appeal, advises the court that he is unable to suggest any basis for a claim of error after consulting the defendant, the latter's trial lawyer, and the prosecuting attorney, and after examining a transcript of the

government's evidence (furnished him at the court's direction pursuant to his earlier suggestion that the evidence might be insufficient to support the verdict), is entitled to be furnished a transcript of the balance of the trial proceedings at government expense in order that his counsel may search it for unnoticed "plain error" to bring to the court's attention as a basis for appeal.

## STATUTE INVOLVED

Section 1915(a) of Title 28 of the United States Code provides:

> § 1915. *Proceedings in forma pauperis.*
>
> (a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a citizen who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.
>
> An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

## STATEMENT

On January 15, 1962, following a trial by jury in the United States District Court for the District of Columbia, petitioner was found guilty on both counts of a two-count indictment (Appendix, *infra*, pp. 29-30)

charging him with having purchased, sold, dispensed, and distributed a narcotic drug, heroin, in violation of 26 U.S.C. 4704 (a) (Count 1), and with having facilitated the concealment and sale of the same, knowing it to have been illegally imported, in violation of 21 U.S.C. 174 (Count 2). On February 16, 1962, he was sentenced to concurrent terms of imprisonment of from 20 months to five years on count 1 and five years on Count 2 (Appendix, *infra*, pp. 30-31). On February 19th, petitioner, acting *pro se* (his court-appointed trial counsel, with the approval of the court, having withdrawn his appearance on the same day), applied to the district court for leave to appeal *in forma pauperis*. He alleged in his supporting affidavit that the district court erred (1) "in receiving narcotics into evidence over defendant's objection", (2) "in excluding certain testimony of Sgt. Ellmer [a defense witness] essential to defendant's case", and (3) "in denying defendant's motion for a judgment of acquittal in view of discrepancies in testimony of [a] Government witness which resulted in failure of [the] Government to sustain [its] burden of proof" (Appendix, *infra*, pp. 32-33). The trial court (Holtzoff, D.J.) denied petitioner's application, certifying, in accordance with 28 U.S.C. 1915(a) (*supra*, p. 3), that the appeal was "frivolous and not taken in good faith" (Appendix, *infra*, p. 33).

On March 16, 1962, petitioner filed a *pro se* application to the Court of Appeals for the District of Columbia Circuit for leave to appeal *in forma pauperis*, and requested the appointment of counsel. (R.

1-2). In a supporting affidavit, he assigned seven points as error, as follows (*ibid.*):

1. Judge Holtzoff refuse to here testimony of certain defence witness.
2. Judge Holtzoff made accusation doing testimony of Officer Hutchinson, asserting they are justified in making mistake.
3. Police testified they received a tip, no one testified to confirm their statment.
4. The conflicting testimony of police officer should not have been excepted.
5. In adequate counsel.
6. He did not challenge the indictment sufficient.
7. The indictment was not a true bill.

On March 19, the then Chief Judge of the court of appeals appointed petitioner's present counsel (a different attorney from the lawyer who represented him at the trial) to represent him in connection with the application, and granted counsel thirty days in which to file a supporting memorandum (R. 3).

On April 17, 1962, petitioner's counsel filed in the court of appeals a motion for an order directing that he be furnished a stenographic transcript of the trial proceedings at government expense, and for an extension of thirty days from his receipt of the transcript in which to file the requested memorandum (R. 4-6). The motion alleged: that petitioner "appears to present at least two issues for appeal", *viz.*, that the evidence was insufficient to sustain the conviction, and that evidence was improperly received because it was the product of an illegal arrest (R. 4); that (R.5)

> careful search of the transcript of the motion to suppress evidence made before trial [1], interview of the petitioner, and of both prosecuting and defense trial counsel have failed to reveal any information to support petitioner's claims or any other possible grounds for appeal;

and that, for the latter reason, and "because the claims of error asserted here cannot be disposed of with finality without consideration of the trial proceedings as a whole", counsel "is compelled to seek a transcript of the trial in order to determine whether there is any basis for the petition for leave to appeal" (R. 5). The government's memorandum in opposition to the motion noted the conclusory nature of the claims of error and counsel's failure to explore other possible avenues of substantiating the generalized claims, such as consultation with the trial judge and court reporter (R. 7-8).

On May 11, 1962, the court of appeals entered a *per curiam* order allowing petitioner to proceed *in forma pauperis* "to the extent of having the stenographic transcript of the testimony and evidence presented by the government prepared at the expense of the

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[1] It appears from the district court records that a motion to suppress the use as evidence of the narcotics involved was heard and denied by the court (Matthews, D.J.) on December 15, 1961, and that a transcript of the hearing was furnished petitioner, at his trial counsel's request, for use at the trial. (The evidence adduced at the hearing established that the narcotics were retrieved by the arresting officers from a tree-box on a public sidewalk, into which the officers had seen petitioner discard them a moment prior to his arrest.)

United States", and directing that the time for filing the requested memorandum in support of the petition for leave to appeal without prepayment of costs be extended to thirty days from petitioner's receipt of such transcript (R. 11). *Coppedge* v. *United States*, 369 U.S. 438, decided two weeks previously, was cited as authority for the order.

On May 21, 1962, petitioner filed in the court of appeals a motion for "clarification or rehearing" of the May 11 order (R. 12-14). Arguing that investigation of all possible grounds of appeal "demands nothing less than a transcript containing all the testimony and evidence, all the colloquy, comment, argument and instructions", and that "[s]ince a non-indigent litigant can obtain such a complete transcript to search for error, it cannot be withheld from an indigent litigant", he renewed his request for a transcript of the "entire [trial] proceedings" (R. 13). On July 23, the motion was denied, the order of denial extending until thirty days from that date the time for filing the requested memorandum in support of the application for leave to appeal as an indigent (R. 15).

On September 20, 1962—following a further extension of time (R. 16-17)—counsel filed in the court of appeals a motion for an order directing that petitioner be furnished with a free transcript of the balance of the trial proceedings, or, in the alternative, for an order denying him leave to appeal *in forma pauperis* (R. 18-20). Counsel stated that he had "carefully examined the transcript furnished pursuant to the order of May 11" and that he was "unable to perceive therein any non-frivolous ground for appeal" (R. 18).

He said that he was unable, however, to state to the court that he had conscientiously investigated every possible ground for appeal, since, not having been furnished with a transcript of the testimony and evidence presented by the defense and the judge's instructions to the jury, he could not be sure that "unnoticed plain error" had not occurred at those stages of the proceedings (R. 18, 19). He claimed the right, on petitioner's behalf, to "comb" the entire record in search of some unnoticed error to bring to the court of appeals' attention as a basis for appeal (R. 19).

On October 24, 1962, the court of appeals, one judge dissenting, denied the motion for a transcript of the remander of the trial proceedings, noted the alternative motion that leave to appeal as an indigent be denied, but took no action with respect to it (R. 22). Thus, as we noted in our memorandum in opposition to certiorari (No. 783 Misc., Oct. Term, 1962, pp. 3, 4), and as petitioner, by invoking the "before judgment" jurisdiction of this Court (Pet. Br. 1),[2] acknowledges, the court of appeals has made no final disposition of petitioner's application for leave to appeal *in forma pauperis*.[3]

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[2] Petitioner invokes the jurisdiction of this Court under 28 U.S.C. 2101(e) (authorizing the filing of an application for certiorari to review a case before judgment has been rendered in the court of appeals "at any time before judgment") as well as under 28 U.S.C. 1254(1). (Pet. Br. 1).

[3] We opposed certiorari in this case on the ground, *inter alia*, that petitioner had made no showing that the case met the requirement of Rule 20 of the Rules of this Court, that, to warrant the exercise by this Court of its "before judg-

## SUMMARY OF ARGUMENT

### I

A. This Court has repeatedly declared, both in federal cases arising under the *in forma pauperis* statute and in State cases arising under the Fourteenth Amendment, that an indigent defendant has no automatic right to a complete transcript of his trial at public expense merely because a non-indigent defendant can purchase such a transcript with his own funds if he chooses to do so. If, as petitioner claims, a would-be appellant *in forma pauperis* is entitled, as of right, notwithstanding a certificate by the trial court that the appeal is not being pursued in good faith, to a complete transcript of his trial in order that his counsel may search it for unnoticed error, then the rule must be that every indigent has precisely what the Court has always insisted he does not have —an unqualified right, on demand, to a complete transcript of his trial at the public's expense.

B. Abstract considerations of equality of treatment of rich and poor alike do not require that an indigent be mechanically supplied a complete transcript at public expense for no other reason than that a non-indigent person can buy such a transcript if he is willing

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ment" jurisdiction, a case must be "of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court." (Memorandum in Opposition, p. 4). We argue, *infra*, pp. 21-27, that the Court should remand this cause to the court of appeals for further proceedings in accordance with *Ingram v. United States*, 315 F. 2d 29, decided by that court subsequent to the last order in this case, while this case was pending in this Court on petition for certiorari.

to make the necessary expenditure. "Absolute equality [of treatment of indigents and non-indigents] is not required; lines can be drawn and we often sustain them." *Douglas* v. *California*, 372 U.S. 353, 357. The fact, for example, that a defendant with funds can secure the services of the best legal assistance within the reach of his purse has never been thought to require that an indigent be permitted to retain, at the expense of the public, any attorney of his choosing. Due process does not require either the States or the federal government to "equalize economic conditions" (*Griffin* v. *Illinois*, 351 U.S. 12, 23 (Frankfurter, J., concurring)) as between poor persons and persons of means.

A rule by which every indigent defendant would be entitled to a complete transcript of his trial in order to look for error, though none was alleged, would be inconsonant with the spirit, if not the letter, of the statutory prohibition against the taking of an appeal *in forma pauperis* where the trial court certifies the appeal not to be taken in good faith. This legislative policy must of course be enforced except insofar as overriding constitutional considerations otherwise dictate. Moreover, because of the "built-in pecuniary brake" upon the incurrence of expenses not deemed reasonably necessary to the successful prosecution of a paid appeal, a rule whereby a complete transcript would be automatically supplied to an indigent in every case would be unsound in principle in that it would place the indigent defendant, in this respect, in a preferred position to that of the appellant who was paying his own costs.

II

This interlocutory proceeding should be remanded to the court of appeals for further proceedings in accordance with that court's subsequent decision in *Ingram* v. *United States*, 315 F. 2d 29. The court there spelled out in detail the kind of information it wished appointed counsel to supply to the court before asking it to order the preparation of an entire transcript at public expense in a case in which the appeal has been certified by the trial judge not to be taken in good faith. This procedure will enable the court of appeals to make an informed judgment as to the necessity for such action in the interest of justice, with due regard for avoiding waste of public funds.

## ARGUMENT

### I

**An Indigent Defendant Whose Appeal Has Been Certified By the Trial Court Not To Be Taken In Good Faith, and Who Makes No Claim of Error, Is Not Entitled To a Complete Transcript of His Trial, To Enable His Counsel To Search It for Unnoticed Error**

Petitioner, whose attempt to appeal from his conviction without prepayment of costs has been certified by the trial court to be "frivolous and not taken in good faith" (*supra*, p. 4), has already been furnished, at government expense, a complete transcript of the government's evidence—the only portion of the trial proceedings relevant to the claims of error which

his counsel has suggested[4]—and his counsel has acknowledged that he has been unable to find therein any basis for a claim of error. He now contends that, having been unsuccessful in substantiating the only errors claimed by reference to the portion of the transcript pertinent to that inquiry, he has a right to be furnished, notwithstanding the trial court's certificate, a free transcript of the remainder of the trial proceedings—in order that his counsel may search it for unnoticed and unsuspected "plain error" to bring to the attention of the court of appeals. Otherwise, the argument runs, he will suffer invidious discrimination by reason of his indigence—since a person of means would be able to purchase a transcript of his trial for this purpose (Pet. Br. 6-12).

We submit that the contention is unsound and without support in any of the decisions of this Court. It is, moreover, irreconcilable with the spirit, if not the letter, of the congressional mandate making the trial court's certificate of lack of good faith a bar to the right of appeal as an indigent (28 U.S.C. 1915(a),

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[4] *Viz.*, insufficiency of the evidence to sustain the conviction and the admission of evidence suggested to have been possibly the product of an illegal arrest (*supra*, p. 5). Petitioner's *pro se* allegations of error (*supra*, pp. 4-5)—made before counsel was appointed by the court of appeals to represent him—included one claim to which the portion of the transcript furnished him did not pertain, *viz.*, the assertedly wrongful exclusion of testimony by a defense witness. Counsel, however, following his appointment and investigation of the case (which included consultations with petitioner's trial lawyer and the prosecuting attorney, see *supra*, p. 6), did not renew this claim—having concluded, presumably, that it lacked substance.

*supra*, p. 3). Althought this Court has held such a certificate not to be "conclusive" of the indigent's right (*Coppedge* v. *United States*, 369 U.S. 438, 446), it has always recognized the certificate to be "entitled to weight" (*ibid.*)—indeed to "great weight" (*Johnson* v. *United States*, 352 U.S. 565, 566). If the sweeping position taken by petitioner were to be sustained, the practical effect, in our view, would be virtually to deprive the certificate of all its authority and significance.[5]

### A. *Petitioner's contention is irreconcilable with the repeated statement by this Court that an indigent defendant has no automatic right to a complete transcript of his trial at public expense merely because a defendant with funds can purchase such a transcript*

This Court has repeatedly declared, both in federal cases arising under the statute and in State cases arising under the Fourteenth Amendment, that an indigent defendant has no automatic right to a complete transcript of his trial at public expense merely because a non-indigent defendant can purchase such a

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[5] Petitioner's suggestion that the certificate "can be given weight only on the question of the indigent's good faith in pleading poverty" (Pet. Br. 13) is refuted by the clear language of the statute as well as all the decisions and is manifestly unsound. His further suggestion that "frivolity is negated by the existence of 'plain error', unnoticed below and unclaimed" (Pet. Br. 6) is specious. The trial court's determination that the appeal is frivolous can of necessity relate only to errors claimed. Cf. *Surratt* v. *United States*, 262 F. 2d 691 (C.A.D.C.): "Not knowing what issues, if any, counsel will present, we cannot know whether they will be frivolous" (at 691-692).

transcipt with his own funds if he chooses to do so. *Johnson* v. *United States*, 352 U.S. 565, 566; *Griffin* v. *Illinois*, 351 U.S. 12, 20; *Eskridge* v. *Washington Prison Board*, 357 U.S. 214, 216; *Draper* v. *Washington*, 372 U.S. 487, 495. And see *Farley* v. *United States*, 354 U.S. 521, 522-523; *Coppedge* v. *United States*, 369 U.S. 438, 446. Cf. *Miller* v. *United States*, 317 U.S. 192, 198. Thus, in *Johnson* v. *United States*, *supra*, the Court, while holding that an indigent must be permitted to challenge the certificate by the trial court that the appeal is not taken in good faith, also said (352 U.S. at 566):

> This does not require that in every such case the United States must furnish the defendant with a stenographic transcript of the trial. * * *

It is enough, the Court held, that he be assured some appropriate means, such as "the district judge's notes or an agreed statement by trial counsel," of making manifest the basis of his claim that the trial court's certificate is in error (*ibid.*). And see *Coppedge* v. *United States*, *supra*, 369 U.S. at 446, holding that the would-be appellant, in cases so certified, must be supplied with "a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate * * * is in error * * *."*

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* Petitioner's effort (Pet. Br. 13-16) to demonstrate that the *Coppedge* decision is authority for the broad proposition he is urging here—*i.e.*, that every indigent has an automatic right to a complete transcript of his trial, without alleging any error, in order that he or his counsel may search it for error to allege—is refuted by the plain language of the opinion. In the passage containing the language

Similarly, in *Griffin* v. *Illinois*, *supra*, the Court, while holding that an indigent has a right to as adequate appellate review of his state conviction as a defendant who has money enough to buy a transcript of his trial (351 U.S. at 19), stressed that "We do not hold, however, that Illinois must purchase a stenographer's transcript in every case where a defendant cannot buy it" (351 U.S. at 20)—observing that the State might find "other means of affording adequate and effective appellate review to indigent defendants," such as "bystanders' bills of exceptions" (*ibid.*).[7] And in *Draper* v. *Washington*, *supra*, the

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quoted in the text, *supra*, the Court said (*ibid.*): "* * * if from the face of the papers he [the defendant] has filed, it is apparent that the applicant *will present issues for review* not clearly frivolous, the Court of Appeals should then grant leave to appeal *in forma pauperis*, appoint counsel to represent the appellant and proceed to consideration of the appeal on the merits in the same manner that it considers paid appeals. If, on the other hand, *the claims made or the issues sought to be raised* by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant with both the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal *in forma pauperis* should be allowed" (emphasis added). It is clear, in short, that *Coppedge* took it for granted that the application filed by the indigent, concerning which the Court was speaking, raised issues and made claims of error. The Court did not have in mind an application which insisted upon a right to examine the transcript to look for issues to raise.

[7] Opinion of Mr. Justice Black. Cf. Mr. Justice Frankfurter's concurring opinion, 351 U.S. at 24.

Court "reaffirm[ed] the principle [of the *Griffin* case] that a State need not purchase a stenographer's transcript in every case where a defendant cannot buy it" (372 U.S. at 495), adding, "the fact that an appellant with funds may choose to waste his money by unnecessarily including in the record all of the transcript does not mean that the State must waste its funds by providing what is unnecessary for adequate appellate review" (372 U.S. at 496).

It is evident that if the broad position taken by petitioner and the *amicus curiae* in this case were sound, there would be no place for such decisions. If a would-be appellant *in forma pauperis* is entitled, as of right, notwithstanding a certificate by the trial court that the appeal is not being pursued in good faith, to a complete transcript of his trial in order that his counsel may search it for unnoticed error, then the rule must be that every indigent has precisely what this Court has always insisted he does not have—an unqualified right, on demand, to a complete transcript of his trial at the public's expense. See *Ingram* v. *United States*, 315 F. 2d 29, 31 (C.A.D.C.) (quoted in relevant part *infra*, p. 23, fn. 9). For it obviously cannot be that indigents who, like petitioner, make no claim of error are entitled to free transcripts of their trials to search for error, while indigents who challenge their convictions on specific grounds are entitled to only those portions of their trial records which are pertinent to their claims. If a poor person who is unable to suggest any basis for a claim of error is entitled to a complete transcript in order to search for error, then a poor person who makes specific as-

sertions of error must be entitled to a complete transcript in order to search for other error.[*] Thus, the consequence of sustaining petitioner's claim in this case would necessarily be—as petitioner indeed acknowledges (Pet. Br. 11-12)—that all indigents who manifest the desire to appeal from their convictions have an automatic right to complete transcripts of their trials at the government's expense, without the necessity for making any claim of error whatever, even of the most conclusory sort. The necessity for a particularized showing of need, upon which this Court has always insisted, would be eliminated.

**B. *The principle of equal justice for all litigants neither requires nor justifies the rule contended for by petitioner***

The principle of "equality of consideration for all litigants" (*Coppedge* v. *United States*, 369 U.S. 438, 447) neither requires nor justifies reconsideration by this Court of its traditional insistence that complete transcripts of the trial proceedings need not be furnished to indigent appellants at public expense in all circumstances.

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[*] By the same token an indigent whose application for leave to appeal *in forma pauperis* is *granted* would be entitled as of right to a complete transcript—regardless of how unnecessary it might be to review the errors claimed—in order to permit counsel to search it for other errors. Under petitioner's contention, Rule 33(b)(2)(i) of the Rules of the court below ("* * * If the court allows the appeal in forma pauperis, the court shall then also determine at the same time whether, and to what extent, a transcript will be necessary for the proper determination of the appeal. * * *") could not be sustained.

1. It is of course true, as petitioner points out (Br. 6), that a defendant with funds can always secure a complete transcript of his trial if he is willing to make the necessary expenditure. He can do so, moreover, for the specific purpose for which petitioner seeks the transcript of his trial, *i.e.*, to enable his counsel (who may be the same attorney who tried the case, a new attorney, or both) to search it for unnoticed "plain error" to bring to the appellate court's attention—or, indeed, for any purpose. It does not follow, however, that abstract considerations of equality of treatment for all litigants require that an indigent be accorded the same privilege at public expense.

Petitioner's argument to the contrary assumes that an indigent, who seeks to appeal from his conviction at the expense of the government, and an ordinary defendant, who is paying his own appellate costs, are constitutionally entitled to absolute equality of consideration in all respects whatsoever. But this is no more required of the federal government under the Fifth Amendment than it is of the States under the Fourteenth. "[I]t is appropriate to observe," as this Court noted in *Douglas* v. *California*, 372 U.S. 353, 356-357 (with specific reference to indigents and non-indigents),

> that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an "invidious discrimination." [Citing, *inter alia*, *Griffin* v. *Illinois*, *supra*, 351 U.S. at 18.] *Absolute equality is not required; lines can be and are drawn and we often sustain them.* [Emphasis added.]

What petitioner in essence is demanding is the equalization of his economic condition—so far as the ability to procure a complete transcript of his trial is concerned—with that of a person of means. But the federal government, like the States,—

> need not equalize economic conditions. A man of means may be able to afford the retention of an expensive, able counsel not within the reach of a poor man's purse. Those are contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion. * * *

*Griffin* v. *Illinois*, *supra*, 351 U.S. at 23 (Frankfurter, J., concurring). It has for this reason never been doubted that (*id.* at 24)

> in order to avoid or minimize abuse and waste, a State may appropriately hedge about the opportunity to prove a conviction wrong. * * *

It is not an unreasonable "hedging about" of an indigent's opportunity to prove his conviction wrong to require that, *where, as here, the trial court has certified the appeal to be frivolous and not taken in good faith,* at least some claim of error be made before any part of the transcript of his trial be furnished him at the public's expense, and to limit the portions furnished to those having relevance to the errors claimed. Where the indigent's counsel, appointed for the purpose by the court of appeals, is unable, after reasonable inquiry, including consultations with his client, the latter's trial attorney, and government counsel, to suggest any basis for a claim of even possible error, it scarcely violates due process canons—

those fundamental principles "implicit in the concept of ordered liberty" (*Palko* v. *Connecticut*, 302 U.S. 319, 325)—for the court to refuse to direct that a complete transcript of the trial be supplied him at government expense so that his counsel may search it for error.

2. This Court, to be sure, is not limited by due process considerations in prescribing rules of procedure for the lower federal courts. In the exercise of its supervisory powers, it may adopt for those courts a rule of practice which, not being imperatively required by the demands of due process, could not be imposed on the courts of the States. Cf. *McNabb* v. *United States*, 318 U.S. 332. A rule, however, by which every indigent defendant would be entitled to a complete transcript of his trial in order to look for error, though none was alleged, would, as we have suggested, seem to be inconsonant with the spirit, if not the letter, of the statutory directive as to the effect of a bad-faith certificate by the trial court. This legislative statement of policy must of course be observed and enforced by the courts except insofar as overriding constitutional considerations require otherwise. Moreover, the rule urged by petitioner would, we believe, be unsound in principle in that it would in fact place the indigent person—so far as the procural of a transcript is concerned—in a more advantageous position than that of the paying appellant. In the case of a paid appeal there is a "built-in pecuniary brake" (*Coppedge* v. *United States*, 369 U.S. 438, 455 (Stewart, J., concurring)) upon the incurrence of expenses not deemed reasonably necessary to the successful

prosecution of the appeal. A paying appellant might well refrain from ordering a complete transcript of his trial on the chance, which he might reasonably regard as disproportionate to the expense entailed, that his appellate counsel will discover reversible error in it which went unnoticed at the trial. Under the rule advocated by petitioner and the *amicus curiae*, on the other hand, an indigent appellant would be subject to no such financial deterrent. He would be, as we have suggested, entitled to a complete transcript on demand, at the public's expense, as a matter of course. Unlike the pecunious defendant, he would be asserting an absolute right to fritter away the public's money—not his own.

## II

### This Interlocutory Proceeding Should Be Remanded To the Court of Appeals for Further Proceedings In Accordance with That Court's Subsequent Decision In *Ingram* v. *United States*

As noted in the *Statement*, *supra*, p. 8, the court of appeals, in its order of October 24, 1962 (denying petitioner's motion that he be furnished a full free transcript of the trial proceedings), took no action with respect to petitioner's alternative motion that leave to appeal as an indigent be denied. As a consequence, no final order has ever been entered in the case by the court below. If the Court agrees with us that petitioner is not entitled to a full transcript on the basis of the showing so far made, we submit that it would be appropriate to remand this case to the court of appeals for further proceedings in ac-

cordance with that court's subsequent decision in *Ingram* v. *United States*, 315 F. 2d 29, which articulated a procedure which counsel for indigents should follow in situations similar to the instant case.

The *Ingram* case, decided December 6, 1962, six weeks after the last interlocutory order in this case (the order of October 24, 1962, *supra*), was, in all relevant respects, identical. There, an indigent defendant, after unsuccessfully seeking leave from the district court to appeal from his conviction *in forma pauperis*, filed, *pro se*, a similar petition in the court of appeals, in which he complained of his conviction in a "confused and inartful way" (315 F. 2d at 29). The court of appeals, in accordance with its usual practice in such cases, appointed counsel to represent the petitioner, and later a second attorney (at the first one's request). The attorneys did not adopt their client's *pro se* claims of error, but, on the contrary, "seem[ed] to take pains to avoid asserting any error" (315 F. 2d at 30). They "frankly concede[d]" that they were unable to claim error, but said that their inability to do so was due to the fact that they had not been provided with a complete transcript of the trial. They contended that, "having been unable to discover a ground for appeal through the available sources of information, they [were] entitled to a transcript to conduct a search for error as a matter of due process of law" (*ibid.*). Following a denial of their request, counsel moved for reconsideration, contending that the furnishing of a transcript was required by *Coppedge* v. *United States*, 369 U.S. 438.

The court held the *Coppedge* decision to be inapplicable—because of counsel's failure to assert any error whatever (315 F. 2d at 30-31)[*]—but proceeded to consider whether counsel's contention had merit apart from *Coppedge* (at 31-32). The court, noting counsel's argument that, having been unsuccessful in discovering a basis for claiming error as a result of interviews with the principals to the proceedings in the district court, they should be supplied with a complete transcript of the trial, since otherwise there was no effective means for attacking the conviction and "a barrier is thus erected that would not confront a non-indigent defendant in a similar situation," stated that it was "not unsympathetic with this view" (315 F. 2d at 31). The court referred in this connection to an earlier case in which a transcript had been ordered when the attorney for the indigent brought to the court's attention that the defendant's trial attorney had since died, that the prosecutor had resigned from the United States Attorney's Office, and that the trial judge could not be reached—so that "the normal sources [for discovering possible bases for ap-

[*] The court said on this point (315 F. 2d at 31): "If counsel wish to press their motion for transcript under that [*Coppedge*] case they must meet its terms by claiming *some* error. If, on the other hand, they seek a transcript as a matter of due process of law to *search* for some claim of error not suspected or articulated, they must recognize, as we now hold, that the Coppedge case is not applicable. If our position is not correct, then the rule is that a transcript must be furnished to every indigent appellant at Government expense so that he may search for error, even though he has alleged none. The Supreme Court has not yet gone so far." [Emphasis by the court.]

peal] were not available" (*ibid.*). In the pending (*Ingram*) case, on the other hand, the court observed, counsel, although they had set out in their motion what appeared to be a comprehensive investigation of the trial proceedings, had not informed the court in specific terms what they had discovered from the parties interviewed and their examination of the parts of the record which were available to them (*ibid.*). To require the preparation of a complete transcript at government expense without such a detailed showing of need, the court said, would amount to an abdication by the court of its judicial function (315 F. 2d at 31-32). "We are unable to see," said the court (at 32),

> why present counsel cannot, upon the basis of their investigation, advise us as to the circumstances giving rise to the indictment, the theory of the prosecution, the defenses raised by petitioner, the witnesses presented by each party and the pertinence of their testimony, the objections made by defense counsel, and the possible grounds for appeal. * * * Until such steps have been taken by counsel, they have not utilized available remedies or complied with judicial holdings.

The court accordingly denied the motion for reconsideration but without prejudice to its renewal upon a showing in compliance with the opinion.[10]

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[10] Chief Judge Bazelon, dissenting, thought that a transcript was required to be ordered without further proceedings—on the basis of the indigent's conclusory claims of error in his *pro se* petition. He deemed it immaterial that the petitioner's appointed counsel did not adopt any of these claims (315 F. 2d at 33).

Aside from the fact that the petitioner in the *Ingram* case was seeking the entire transcript of his trial, whereas here the petitioner has already received a major part of the transcript and is seeking the remainder, the two cases, it is apparent, are alike. Here, as in *Ingram*, counsel has made no more than a superficial and conclusory report of the results of his investigations to the court below. He has not reported to the court concerning such details as "the circumstances giving rise to the indictment, the theory of the prosecution, the defenses raised by petitioner, the witnesses presented by each party and the pertinence of their testimony, the objections made by defense counsel, and the possible grounds for appeal" (*supra*, p. 24)—information which the court has indicated it wishes to have before being asked to order the preparation of an entire transcript (or, as here, a principal segment of one) at public expense, so that it can make an informed judgment as to the necessity for such action in the interest of justice, with due regard for avoiding waste of public funds. Appellate counsel has merely indicated to the court what persons he has consulted (petitioner, his trial counsel, and the prosecutor, but not, so far as appears, the trial judge, the court reporter, or any witness), and has advised it that his interviews with these persons—together with his reading of the transcript of the proceedings on the pretrial motion to suppress and the portion of the trial proceedings already supplied him (the government's evidence)—have failed to reveal any basis for a claim of error.

The court below concluded in the *Ingram* case, correctly we submit, that it could not "accept such a conclusory representation, for to do so would be to delegate to counsel our judicial function in this regard, without reserving any means by which to check or determine the accuracy of their judgment" (315 F. 2d at 31-32). Unless, therefore, the rule is to be that an indigent has an automatic and unconditional right to a complete transcript of his trial at government expense in every case (to which we have addressed ourselves in Point I, *supra*), we suggest that the proper disposition of this case would be to remand it to the court below to give counsel an opportunity to make to that court the kind of report and showing which the court indicated in the *Ingram* case it desired to have in cases of this sort before being asked to authorize the expenditure of public funds to transcribe an entire trial. Depending on the character of the showing made, the court of appeals might then take any one of a number of courses of action. It might grant in full counsel's request for the balance of the transcript. Or it might grant the motion in part—by directing, for example, that the balance of the proceedings be fully transcribed except for colloquy and argument of counsel; or that some defense testimony be transcribed but that other parts of it be omitted as immaterial; or that the instructions to the jury be transcribed but that the testimony be omitted; etc. Or it might deny the motion *in toto*.[11]

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[11] On remand, the court would of course be free to determine what weight should be given to petitioner's *pro se*

But, whatever the eventual order of the court, it would be one made on the basis of an informed appraisal of all pertinent considerations, and subject to review in this Court on the basis of a record that would present the issues in the context of a detailed development of the relevant facts.[12]

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claims of error, even if appointed counsel fails to adopt them. See the opinion of Chief Judge Bazelon, dissenting, in *Ingram* v. *United States*, *supra*, 315 F.2d at 33. That decision is plainly for the court of appeals in the first instance. Cf. *Scott* v. *United States*, 374 U.S. 502.

[12] Petitioner's (Pet. Br. 9, 10-11, 12-13) and the *amicus curiae*'s (Br. 9-12) reliance on recommendations made by the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice is, we submit, misplaced. Although the Committee's Report (1963) at times appears to take the position that a would-be appellant *in forma pauperis* should have an automatic right to a complete transcript of his trial at public expense (see, *e.g.*, pp. 101, 102), it is not clear that the Committee intended to go so far. See, particularly, page 115 of the Report, where the Committee states: "We believe * * * that the solution of the problems of federal *forma pauperis* appeals is, *when necessary*, to provide defendants with transcripts of trial proceedings without preliminary screening * * *" (emphasis added). This statement is hardly consistent with a view that a complete transcript should be furnished as a matter of course. Moreover, the Committee makes clear its view that the ends it suggests should be accomplished by legislation (p. 115). The issue before the Court is, of course, whether there is an automatic right to a complete transcript under present law.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the cause should be remanded to the court of appeals for further proceedings.

ARCHIBALD COX,
*Solicitor General.*

HERBERT J. MILLER, JR.,
*Assistant Attorney General.*

PHILIP R. MONAHAN,
*Attorney.*

SEPTEMBER 1963.

## APPENDIX

### EXCERPTS FROM THE DISTRICT COURT RECORD

### 1. *Indictment*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**Holding a Criminal Term**

**Grand Jury Impanelled on August 31, 1961,**
**Sworn in on September 5, 1961**

**THE UNITED STATES OF AMERICA**

***v.***

**ZEBEDEE HARDY**

**Criminal No. 822-'61**

**Grand Jury No. 1095-61**

**Violation:**

**26 U.S.C. 4704 (a), 21 U.S.C. 174 (Possession of Narcotics; Facilitation of Concealment and sale of Narcotics, knowing same to have been imported contrary to law)**

The Grand Jury charges:

On or about August 28, 1961, within the District of Columbia, Zebedee Hardy purchased, sold, dispensed and distributed, not in the original stamped package and not from the original stamped package, a narcotic drug, that is, forty-one capsules containing a mixture totaling about 2,270 milligrams of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol.

SECOND COUNT:

On or about August 28, 1961, within the District of Columbia, Zebedee Hardy facilitated the concealment and sale of a narcotic drug, that is, forty-one capsules containing a mixture totaling about 2,270 milligrams of heroin hydrochloride, quinine hydrochloride, milk sugar and mannitol, after said heroin hydrochloride had been imported, with the knowledge of Zebedee Hardy, into the United States contrary to law. This is the same heroin hydrochloride which is mentioned in the first count of this indictment.

A TRUE BILL:

/s/ Clifford S. (Last name illegible)
Foreman

/s/ David P. Acheson
Attorney of the United States in and for the District of Columbia

(Endorsed "Filed in Open Court Oct. 2, 1961")

2. *Judgment and Commitment*

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 822-61

UNITED STATES OF AMERICA

*v.*

ZEBEDEE HARDY

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On this 16th day of February, 1962, came the attorney for the government and the defendant appeared in person and by counsel, Thomas P. Brown

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of

> Violation of Title 26, U.S. Code, Section 4704 (a) and violation of Title 21, U.S. Code, Section 174

as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

> Twenty (20) Months to Five (5) Years on count 1; Five (5) Years on count 2; said sentences by the counts of the indictment to run concurrently

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Alexander Holtzoff
United States District Judge

(Endorsed "Filed Feb. 19, 1962")

3. *Affidavit in Support of Application for Leave to Appeal in Forma Pauperis*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 822-61

UNITED STATES OF AMERICA

*vs.*

ZEBEDEE HARDY

AFFIDAVIT IN SUPPORT OF APPLICATION TO PROCEED WITHOUT PREPAYMENT OF COSTS

I, ZEBEDEE HARDY, being first duly sworn, depose and say that I am the defendant in the above-entitled case; that in support of my application to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the nature of my (defense, action, appeal) is briefly stated as follows:

1) Trial Judge erred in receiving narcotics into evidence over defendant's objection.

2) Trial Judge erred in excluding certain testimony of Sgt. Ellmer essential to defendant's case.

3) Trial Judge erred in denying defendant's motion for a judgment of acquittal in view of discrepancies in testimony of Government witness which resulted in failure of Government to sustain burden of proof.

I further have truthfully set forth below information relating to my ability to pay the costs of defending the case against me:

* * * *

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

/s/ Zebedee Hardy

SUBSCRIBED AND SWORN TO before me this 19th day of February, 1962

.....

Notary Public, D.C.

HARRY M. HULL, Clerk

By /s/ Jerry K. Emrich
Deputy Clerk

(Endorsed "Filed Feb. 19, 1962")

Feb. 19, 1962

The application to proceed on appeal without prepayment of costs, and with appointed counsel, is denied. I certify that the appeal is frivolous and not taken in good faith.

/s/ Alexander Holtzoff
District Judge

(Endorsed "Filed Feb. 20, 1962")

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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

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## No. 112

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ZEBEDEE HARDY,

*Petitioner,*

v.

UNITED STATES OF AMERICA.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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## REPLY BRIEF FOR PETITIONER

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MORART G. RATNER
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Washington 5, D. C.
*Counsel for Petitioner*
(Appointed by the Court of Appeals)

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1963**

## No. 112

ZEBEDEE HARDY,

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v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

## REPLY BRIEF FOR PETITIONER

Were the opposition anyone but the Government, we would consider a reply brief supererogation. But since the Solicitor General has elected not to confess error, surgical exploration may not be amiss.

The Government continues to ignore that the *Johnson* dictum reflected uncritical assumption that an indigent defendant, unlike a solvent defendant, has the burden of proving substantiality. On critical appraisal in *Coppedge*, that fallacy was exploded. This Court held that, despite the District Court's certificate, the burden rests on the Government to prove frivolity. 369 U.S. at 447-448. It follows that to warrant denial of the right to appeal the Government must carry "the burdens of proof and persuasion" (*ibid.*) that appeal cannot possibly present a sub-

stantial question. How the Government can do this to the satisfaction of the Court of Appeals, as it must under *Ellis*, without providing that Court a complete stenographic transcript, the Government does not explain. The Government's silence about *Ellis* is as deafening as that of the opinion below. If the Court of Appeals cannot properly conclude that there is no non-frivolous ground for appeal without examining a complete transcript, how can delay in providing such a transcript to indigent's counsel be anything but invidious discrimination against indigent's appeals?

The Government would justify forcing indigent defendants to meet a charge of frivolity without the transcript available for a price to every solvent defendant on the theory that Government is not required to "equalize economic conditions." (Br. 10, 18-19.) But the Government is constitutionally required to do the best it possibly can. It must assign counsel deemed competent by a court. Courts do not exempt even the ablest and highest priced members of the criminal law bar from *forma pauperis* assignments. It is true, of course, that an indigent defendant lacks the freedom of choice available to a defendant with money, but even a solvent defendant cannot commandeer the services of any particular lawyer and equalization of freedom of selection is, as a practical matter, quite impossible. It is, however, not impossible, and it is therefore constitutionally indispensable, to make it as feasible for indigents' appointed counsel as for solvent defendants' chosen counsel, to defend a charge of frivolity by supplying a complete stenographic transcript at government expense.

The Government clutches the attributed "spirit" (Br. 10, 12, 20) of § 1915 as if it were a life preserver. But it offers no rational defense of the attribution. Thus, the

Government ignores the demonstration in *Coppedge* that the requirement of a district court certificate was not conceived with special reference to criminal appeals. 369 U.S. at 444-445. It ignores Mr. Justice Stewart's statement that:

> "The provisions governing appeals *in forma pauperis* are not to be read as diluting [the] right [to appeal] by imposing a more stringent test of merit. Rather, 28 U.S.C. § 1915, provides at most a device for advance screening of appeals which, if paid, would upon motion be dismissed before argument as frivolous." 369 U.S. at 455.

It ignores the holding of *Douglas* v. *California*, 372 U.S. at 358, that denial to indigents of the same transcript available to solvent defendants for a price does go to the merits; denial leaves the indigent the right to "a meaningless ritual, while the rich man has a meaningful appeal." And it balks at our demonstration that the section cannot be read as authorizing courts to require either indigents or their counsel to specify errors. Characterization of our analysis of § 1915 as "specious" (Br. 13, note 5), is *ipse dixit*, not argument. That the trial court cannot know, "where the errors are hidden" (*Douglas*, 372 U.S. at 358), what issues warranting review appointed counsel or the Court of Appeals will uncover upon perusal of a complete transcript (*ibid.*), is exactly why the "weight" of its certificate cannot bar perusal.

Finally, the argument (Br. pp. 20-21), that to require the Government to furnish an indigent defendant a complete stenographic transcript would place him "in a more advantageous position than that of a paying appellant" because a paying appellant might be deterred by cost considerations "from ordering a complete transcript" is ex-

actly the argument this Court explicitly rejected in *Draper v. Washington*, 372 U.S. 487, 495, note 4:

> "The State also argues that in practical effect there is no difference at all between the rights it affords indigents and nonindigents, because a moneyed defendant, motivated by a 'sense of thrift,' will choose not to appeal in exactly the same circumstances that an indigent will be denied a transcript. We reject this contention as untenable. It defies common sense to think that a moneyed defendant faced with long-term imprisonment and advised by counsel that he has substantial grounds for appeal, as petitioners were here, will choose not to appeal merely to save the cost of a transcript."

Although four members of this Court dissented in *Draper*, we do not read their opinion as resting, in any part, on the defiance of "common-sense" which assumes that moneyed defendants will elect to forego the possibility of reversal to save the expense of a transcript. Even if indigents were, *pro tanto*, placed in a better position, to defend a charge of frivolity, such preference would merely tend to balance the "disadvantages in the defense of their cases [below] inherent in their impecunious condition . . . ." *Coppedge*, 369 U.S. at 450.

Respectfully submitted,

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(Appointed by the Court
of Appeals)